Dhinesh a/l Tanaphll v Lembaga Pencegahan Jenayah & Ors

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05(HC)-12–01 OF 2021(B)
NALLINI PATHMANATHAN, HARMINDAR SINGH AND RHODZARIAH BUJANG FCJJ
11 APRIL 2022

Criminal Procedure — Habeas corpus — Preventive detention — Detainee under two-year detention pursuant to order made under Prevention of Crime Act 1959 ('POCA') sought writ of habeas corpus for release from detention — Whether detainee had proven commission of several fundamental breaches of procedure under POCA that invalidated his detention — Whether s 15B of the POCA which purported to oust court's jurisdiction under art 5(2) of the Federal Constitution ('FC') to review legality of detention was null and void — Whether art 4(1) of the FC enabled court to review and strike down any legislation or provision therein which was inconsistent with the FC

The appellant's instant appeal was against the High Court's dismissal of his application for a writ of habeas corpus to release him from a two-year detention at the second respondent's rehabilitation centre. The detention was ordered by the chairman of the Prevention of Crime Board ('the Board') pursuant to s 19A(1) of the Prevention of Crime Act 1959 ('the POCA'). In support of his application, the appellant claimed, inter alia, that: (a) the magistrate who extended his initial 21-day remand (following his arrest) by another 38 days pursuant to s 4(2) of the POCA did so without considering a statement from the public prosecutor as was required under that section; (b) the refusal to allow the appellant to call a witness ('Mathan Raj') to testify at his representation hearing was a fundamental breach of natural justice that denied him of a fair hearing (this allegation was denied by the respondents who said the appellant never requested for Mathan Raj to be called to testify); and (c) the delays by the investigating officer and the inquiry officer in preparing and submitting their respective reports under POCA had prejudiced him. Prior to the hearing of the appeal proper, the court had asked the parties to make further submissions on whether s 15B of the POCA (the ouster clause) precluded the court from exercising any jurisdiction over the Board's acts or decisions (except where it concerned a question of procedural non-compliance under POCA).

Held, unanimously granting the appellant a writ of habeas corpus:

(1) There was non-compliance with s 4(2) of the POCA in that the magistrate's 38-day remand order did not refer to any statement from the public prosecutor contrary to the requirement in s 4(2)(a)(i). This was an

irregularity. The respondents referred to an exhibit annexed to their affidavit showing the requisite statement by a public prosecutor but it was not shown that that statement was contemporaneously made available to the magistrate at the time the remand order for a further 38 days was made. There was no affidavit positively affirming to that fact by the public prosecutor (see paras 218 & 220–221).

(2) There was no merit to the respondents' contention that the habeas corpus application had become academic because the remand order under s 4(2) of the POCA had been replaced by the detention order under s 19A(1). The remedy of the writ of habeas corpus in this jurisdiction was available by reason of art 5(2) of the Federal Constitution ('the FC') under which the detainee's right to question the legality of his detention remained unaffected even in preventive detention legislation. Once art 5(2) came into play, it was incumbent upon a High Court judge to inquire into the legality of the detention. This was expressly provided for in the FC, and the relevant date for the High Court's consideration was the date of filing of the application for judicial review over the legality of the detention. Article 5(2) would be rendered nugatory if it could simply be said that a particular period of detention had expired and been replaced by a detention order under a different section, thereby immunising the Executive's decision from judicial scrutiny under art 5(2). Recent case law had further held that the various stages of detention under various sections of POCA, or even if detention was effected under separate legislation continuing on from a POCA detention, should be treated as one over-arching transaction to ensure the right to review the legality of a detention was not abrogated. The 'academic' argument could not be upheld as it would render futile and ineffective the detainee's right to have the appellate court determine whether or not the High Court's decision was correct (see paras 222–228).

(3) Pursuant to art 151(1)(b), it was essential that the Advisory Board under POCA considered any representations made by a detainee as that was the opportunity for the detainee to present his version of events to refute the statement of facts and allegations made against him. In making his representation, the detainee was entitled to call his witnesses. In the instant case, the version of events given by the officials of the said Board conflicted with that given by the appellant and Mathan Raj which made it difficult for the court to determine which version was true. The conflict could have been easily resolved by the respondents producing the minutes of the hearing but they did not do so. The burden was throughout on the authorities to prove that all requisite procedures and relevant provisions of the FC had been complied with. The court was therefore constrained to draw an adverse inference against the respondents for not providing the relevant minutes of the inquiry. In the circumstances, the court had to conclude that the appellant was denied of

the opportunity to call Mathan Raj as his witness at the inquiry and consequently there had been a breach of natural justice as contained in art 151 of the FC (see paras 232, 235, 244–245, 249–250 & 252–253).

(4) Based on the reasons given by the investigating officer and the inquiry officer on the question of 'delay' in the preparation and submission of their respective reports under POCA, the court was convinced, based on all the circumstances of the case, that there was no undue delay amounting to a fatal irregularity that prejudiced the appellant (see para 263).

(5) Section 15B of the POCA sought to abrogate, limit and restrict judicial powers in relation to preventive detention under the Act by immunising any and all decisions of the Prevention of Crime Board from judicial scrutiny save for procedural irregularities. This restriction relegated the court's function to merely monitoring the manner and mode in which the processes of preventive detention were carried out, eg counting the number of days for each stage of the procedure or whether a particular form had been signed by the detainee or not, etc. Judicial scrutiny had thus been relegated to nothing less than a clerical function (see paras 32 & 34).

(6) If s 15B was valid and constitutional, it meant that the court's power under art 5(2) of the FC to judicially review the validity of detention and its review power under art 4(1) to ensure coherence or adherence of legislation to the provisions of the FC were effectively rendered nugatory. It meant Parliament could pass any law, whether under the special powers in art 149 of the FC or otherwise, to supersede, contravene and override fundamental constitutional safeguards within the FC. It had to be noted that while POCA, which was enacted pursuant to art 149 of the FC, remained constitutionally valid notwithstanding its inconsistency with arts 5, 9, 10 and 13 of the FC, art 149 neither specifically suspended nor removed the operation of art 5(2) which expressly conferred upon the courts the constitutional right to review the legality of detention. A detainee preventively detained under POCA could therefore apply under art 5(2) to be released from detention by way of a writ of habeas corpus (see paras 39, 41 & 44).

(7) The majority judgments of this court in *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 1 MLJ 750 ('Maria Chin') and *Rovin Joty a/l Kodeeswaran v Lembaga Pencegahan Jenayah & Ors and other appeals* [2021] 2 MLJ 822 ('Rovin Joty') had decided that ouster clauses such as s 15B of the POCA were constitutionally valid. But subsequently, the conclusion in *Rovin Joty* that the ouster clause in s 15B of the POCA was constitutionally valid was no longer good law following the quashing of the decision in *Rovin Joty* upon review. That left *Maria Chin*. But an analysis of the principal and concurring judgments (together forming the

majority judgment) in that case gave rise to much uncertainty as to the correct legal position in relation to the fundamental issue of judicial power under the FC. It was difficult to ascertain with any degree of clarity the ratio decidendi of the majority decision in relation to the fundamental issue of the source and ambit of judicial power and, consequentially, the effect of ouster clauses. This court was therefore not bound by the legal reasoning of the majority in *Maria Chin* and was at liberty to adopt a reasoning that it deemed to be most coherent in dealing with the question of the constitutional validity of ouster clauses (see paras 46–47, 50, 83 & 94).

(8) Section 15B of the POCA was void and of no effect for being inconsistent with art 4(1) of the FC. The courts were constitutionally empowered under art 4(1) to exercise their review function to determine whether or not a statutory provision or a statute itself was consistent with the FC. As the ouster clause directly contradicted art 4(1) by preventing judicial review, it followed that it was inconsistent with that article and no other. As a consequence of s 15B being void, the court was not restricted to reviewing merely irregularities of procedure within POCA itself but was entitled to scrutinise more substantive matters and review the legality of the Board's decision as a whole. The invalidity of s 15B, however, did not allow the court to review the merits of the Minister's decision and substitute that decision with its own. That was never the purpose of the court's review function as the courts were not equipped to deal with matters of policy and did not interfere in the same as such matters fell within the purview of other branches of government, particularly the Executive (see paras 211–213).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi yang menolak permohonan untuk writ habeas corpus untuk membebaskannya dari tahanan dua tahun di pusat pemulihan responden kedua. Penahanan tersebut diperintahkan oleh pengerusi Lembaga Pencegahan Jenayah ('Lembaga') menurut s 19A(1) Akta Pencegahan Jenayah 1959 ('APJ'). Di dalam menyokong permohonannya, perayu menghujahkan bahawa: (a) majistret melanjutkan reman awal 21 hari (berikutan penangkapannya) sebanyak 38 hari lagi menurut s 4(2) APJ tanpa mempertimbangkan pernyataan daripada pendakwa raya seperti yang dikehendaki di bawah peruntukan tersebut; (b) keengganan untuk membenarkan perayu memanggil saksi ('Mathan Raj') untuk memberi keterangan pada perbicaraan adalah pelanggaran prinsip asas keadilan semula jadi yang menafikan perbicaraan yang adil (tuduhan ini dinafikan oleh responden yang mengatakan perayu tidak pernah meminta Mathan Raj dipanggil untuk memberi keterangan); dan (c) kelewatan oleh pegawai penyiasat dan pegawai penyiasat dalam menyediakan dan mengemukakan laporan masing-masing di bawah APJ telah

memprejudiskannya. Sebelum pendengaran rayuan tersebut, mahkamah telah meminta pihak-pihak untuk membuat penghujahan lanjut mengenai sama ada s 15B APJ (klausa pemecatan) menghalang mahkamah daripada menjalankan apa-apa bidang kuasa ke atas tindakan atau keputusan Lembaga (kecuali jika ianya berkaitan dengan persoalan ketidakpatuhan prosedur di bawah APJ).

Diputuskan, sebulat surat membenarkan writ habeas corpus kepada perayu:

(1) Terdapat ketidakpatuhan terhadap s 4(2) APJ di mana perintah reman lanjutan 38 hari oleh majistret tidak merujuk kepada kenyataan daripada pendakwa raya yang bertentangan dengan keperluan dalam s 4(2)(a)(i). Perkara ini adalah ketidakaturan. Responden merujuk kepada ekshibit yang dilampirkan didalam afidavitnya yang menunjukkan pernyataan yang diperlukan oleh pendakwa raya tetapi tidak ditunjukkan bahawa pernyataan tersebut telah disediakan secara serentak kepada majistret pada masa perintah reman yang dilanjutkan selama 38 hari dibuat. Tiada afidavit yang mengesahkan fakta tersebut oleh pendakwa raya (lihat perenggan 218 & 220–221).

(2) Tiada merit di dalam hujah responden bahawa permohonan habeas corpus telah menjadi akademik kerana perintah reman di bawah s 4(2) APJ telah digantikan dengan perintah tahanan di bawah s 19A(1). Remedi writ habeas corpus dalam bidang kuasa ini boleh diperoleh sebab menurut perkara 5(2) Perlembagaan Persekutuan ('PP') di mana hak tahanan untuk mempersoalkan kesahihan penahanannya tetap tidak terjejas walaupun di dalam undang-undang penahanan pencegahan. Sebaik sahaja perkara 5(2) diguna pakai, adalah menjadi tanggungjawab seorang hakim Mahkamah Tinggi untuk menyiasat kesahihan penahanan tersebut. Ini telah diperuntukkan dengan jelas di dalam PP, dan tarikh yang berkaitan untuk pertimbangan Mahkamah Tinggi adalah tarikh pemfailan permohonan untuk semakan kehakiman mengenai kesahihan penahanan tersebut. Perkara 5(2) hanya dikatakan secara sia-sia sekiranya tempoh penahanan tertentu telah tamat tempoh dan digantikan dengan perintah tahanan di bawah seksyen yang berbeza, dengan itu membuatkan keputusan Eksekutif kebal daripada semakan kehakiman di bawah perkara 5(2). Kes terkini telah menyatakan bahawa pelbagai peringkat penahanan di bawah pelbagai bahagian APJ, atau sebarang penahanan dilaksanakan di bawah undang-undang berasingan yang berterusan dari penahanan APJ, harus dianggap sebagai satu transaksi yang berlebihan untuk memastikan hak untuk mengkaji kesahihan penahanan tidak diketepikan. Hujahan 'akademik' tidak dapat diterima kerana ianya akan menjadikan hak tahanan sebagai sia-sia dan tidak berkesan untuk meminta mahkamah rayuan menentukan sama ada keputusan Mahkamah Tinggi tersebut betul atau tidak (lihat perenggan 222–228).

(3) Menurut perkara 151(1)(b), adalah penting bahawa Lembaga Penasihat di bawah APJ mempertimbangkan sebarang representasi yang dibuat oleh seorang tahanan kerana ianya adalah peluang bagi tahanan untuk menghujahkan versi pembelaanya untuk menyangkal pernyataan fakta dan tuduhan yang dibuat terhadapnya. Di dalam membuat representasinya, tahanan berhak memanggil saksi-saksinya. Dalam kes ini, versi peristiwa yang diberikan oleh pegawai-pegawai Lembaga tersebut bercanggah dengan yang diberikan oleh perayu dan Mathan Raj yang menyukarkan mahkamah untuk menentukan versi mana yang benar. Konflik tersebut boleh diselesaikan dengan mudah oleh responden dengan menghasilkan minit perbicaraan namun mereka tidak berbuat demikian. Beban tersebut adalah terletak ke atas pihak berkuasa untuk membuktikan bahawa semua prosedur yang diperlukan dan peruntukan yang berkaitan dengan PP telah dipatuhi. Oleh itu, mahkamah membuat inferens berbalik terhadap responden kerana tidak menyediakan minit siasatan yang relevan. Dalam keadaan ini, mahkamah terpaksa membuat kesimpulan bahawa perayu dinafikan peluang untuk memanggil Mathan Raj sebagai saksinya pada siasatan tersebut dan akibatnya terdapat pelanggaran keadilan semula jadi menurut perkara 151 PP (lihat perenggan 232, 235, 244–245, 249–250 & 252–253).

(4) Berdasarkan alasan yang diberikan oleh pegawai penyiasat dan pegawai inkuiri mengenai perkara 'kelewatan' dalam penyediaan dan penyerahan laporan di bawah APJ, mahkamah ini yakin, berdasarkan semua keadaan kes tersebut, bahawa tiada kelewatan yang tidak wajar yang membawa kepada ketidakaturan serius yang memprejudiskan perayu (lihat perenggan 263).

(5) Seksyen 15B APJ bertujuan untuk membatalkan, mengehadkan dan menyekat kuasa kehakiman berhubung dengan penahanan pencegahan di bawah Akta tersebut dengan mengimunisasi keputusan Lembaga Pencegahan Jenayah daripada penelitian kehakiman kecuali ketidakaturan prosedur. Sekatan ini mengehadkan kuasa mahkamah dengan hanya menyelia prosedur proses penahanan pencegahan dijalankan, contohnya mengira bilangan hari untuk setiap peringkat prosedur atau sama ada borang tertentu telah ditandatangani oleh tahanan, dan lain-lain. Oleh itu, penelitian kehakiman tidak kurang dari fungsi perkeranian (lihat perenggan 32 & 34).

(6) Sekiranya s 15B adalah sah dan berperlembagaan, ini bermakna bahawa kuasa mahkamah di bawah perkara 5(2) PP untuk meneliti secara kehakiman kesahihan penahanan dan kuasa semakannya di bawah perkara 4(1) untuk memastikan pematuhan undang-undang kepada peruntukan PP diberikan secara sia-sia. Ini bermakna Parlimen boleh meluluskan mana-mana undang-undang, sama ada di bawah kuasa khas dalam perkara 149 PP, untuk menggantikan, melanggar dan mengatasi

perlindungan perlembagaan asas dalam PP. Perlu diingatkan bahawa walaupun APJ, yang digubal menurut perkara 149 PP, tetap sah dari segi perlembagaan walaupun tidak konsisten dengan perkara 5, 9, 10 dan 13 PP, perkara 149 tidak menggantung atau menghapuskan peruntukan perkara 5(2) yang memberikan mahkamah hak perlembagaan untuk mengkaji kesahihan penahanan tersebut. Oleh itu, tahanan di bawah APJ boleh memohon di bawah perkara 5(2) untuk dibebaskan daripada tahanan melalui writ habeas corpus (lihat perenggan 39, 41 & 44).

(7) Penghakiman majoriti mahkamah ini dalam *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 1 MLJ 750 ('Maria Chin') dan *Rovin Joty a/l Kodeeswaran v Lembaga Pencegahan Jenayah & Ors and other appeals* [2021] 2 MLJ 822 ('Rovin Joty') telah memutuskan bahawa klausa penyingkiran seperti s 15B APJ adalah sah dari segi perlembagaan. Tetapi selepas itu, kesimpulan dalam *Rovin Joty* bahawa klausa penyingkiran dalam s 15B APJ adalah sah dari segi perlembagaan adalah undang-undang yang tidak lagi diikuti setelah keputusan *Rovin Joty* setelah dikaji semula. Kemudiannya, kes *Maria Chin* telah muncul. Tetapi analisis penghakiman majoriti di dalam kes tersebut menimbulkan ketidakpastian mengenai kedudukan undang-undang yang sebenar mengenai isu asas kuasa kehakiman di bawah PP. Adalah sukar untuk memastikan kejelasan keputusan majoriti berhubung dengan isu asas sumber kuasa kehakiman dan, akibatnya, kesan klausa penyingkiran. Oleh itu, mahkamah ini tidak terikat dengan alasan undang-undang majoriti dalam *Maria Chin* dan bebas untuk menerima pakai alasan yang dianggap paling munasabah di dalam menangani persoalan kesahihan perlembagaan klausa penyingkiran (lihat perenggan 46–47, 50, 83 & 94).

(8) Seksyen 15B APJ adalah tidak sah kerana ianya tidak konsisten dengan perkara 4(1) PP. Mahkamah diberi kuasa perlembagaan di bawah perkara 4(1) untuk menjalankan fungsi semakan mereka untuk menentukan sama ada peruntukan berkanun atau undang-undang tersebut sendiri konsisten dengan PP. Oleh kerana klausa penyingkiran secara langsung bertentangan dengan perkara 4(1) dengan menghalang semakan kehakiman, ianya bertentangan dengan artikel tersebut. Akibat daripada s 15B tersebut telah terbatal, mahkamah ini tidak terhad untuk mengkaji semula ketidakaturan prosedur dalam APJ namun mempunyai kuasa untuk meneliti perkara-perkara yang lebih substantif dan mengkaji kesahihan keputusan Lembaga secara keseluruhan. Walau bagaimanapun, keabsahan s 15B tidak membenarkan mahkamah mengkaji merit keputusan Menteri dan menggantikan keputusan tersebut dengan sendirinya. Hal tersebut bukanlah fungsi semakan mahkamah kerana mahkamah tidak diberi kuasa untuk menangani perkara-perkara dasar dan tidak mencampuri urusan tersebut kerana ianya berada di dalam bidang kuasa cabang kerajaan yang lain, iaitu

A bidang Eksekutif (lihat perenggan 211–213).]

Cases referred to

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Alma Nudo Atenza v PP and another appeal [2019] 4 MLJ 1; [2019] 5 CLJ 780, FC (refd)
BGS SGS Soma JV v NHPC Ltd [2020] 3 MLJ 336; LNIND 2019 SC 995, SC (refd)
Central Asbestos Co Ltd v Dodd [1972] 2 All ER 1135, HL (refd)
Chua Kian Voon v Menteri Dalam Negeri Malaysia & Ors [2020] 1 MLJ 351; [2020] 1 CLJ 747, FC (folld)
Dato' Seri Anwar bin Ibrahim v PP [2011] 1 MLJ 158, FC (refd)
Goh Leong Yong v ASP Khairul Fairoz bin Rodzuan & Ors [2021] 5 MLJ 474; [2021] 8 CLJ 331, FC (refd)
Harper and others v National Coal Board [1974] 2 All ER 441, CA (refd)
Hotel Equatorial (M) Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor [1984] 1 MLJ 363, FC (refd)
Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545, FC (refd)
Kesavananda Bharati v State of Kerala (1973) 4 SCC 225, SC (refd)
Koperal Zainal bin Mohd Ali & Ors v Selvi a/p Narayan (joint administrator and dependant of Chandran a/l Perumal, deceased) & Anor [2021] 3 MLJ 365; [2021] 6 CLJ 157, FC (refd)
Kumaresan a/l Batumalai v Menteri Dalam Negeri, Malaysia & Ors [2019] MLJU 1517, HC (refd)
Kumaran Suppiah v Dato' Noh bin Haji Omar & Anor [2006] 6 MLJ 393, FC (refd)
L Rajanderan a/l R Letchumanan v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2018] supp MLJ 393; [2010] 7 CLJ 653, FC (refd)
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Letitia Bosman v PP and other appeals (No 1) [2020] 5 MLJ 277, FC (refd)
Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187, FC (refd)
Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor [2021] 1 MLJ 750, FC (not folld)
Mark Koding v PP [1982] 2 MLJ 120, FC (refd)
Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Other Appeals [2002] 4 MLJ 449, FC (refd)
Mohammad Azanul Haqimi bin Tuan Ahmad Azahari v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2019] 6 MLJ 220; [2019] 8 CLJ 465, FC (refd)
Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri Malaysia & Ors [2006] 1 MLJ 309; [2005] 4 CLJ 613, FC (refd)

Nivesh Nair a/l Mohan v Dato' Abdul Razak bin Musa, Pengerusi Lembaga Pencegahan Jenayah & Ors [2021] 5 MLJ 320; [2021] 8 CLJ 163, FC (refd)
Phang Chin Hock v PP [1980] 1 MLJ 70; [1979] 1 LNS 67, FC (refd)
PP v Dato' Yap Peng [1987] 2 MLJ 311, SC (refd)
PP v Kok Wah Kuan [2008] 1 MLJ 1; [2007] 6 CLJ 341, FC (refd)
R v Sussex Justices, ex parte McCarthy [1924] 1 KB 256; [1923] All ER Rep 233 (refd)
Rovin Joty a/l Kodeeswaran v Lembaga Pencegahan Jenayah & Ors and other appeals [2021] 4 CLJ 1; [2021] 2 MLJ 822, FC (refd)
Selva Vinayagam a/l Sures v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2021] 1 MLJ 601; [2021] 2 CLJ 29, FC (refd)
Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case [2017] 3 MLJ 561, FC (refd)
Shudangshu Chandra v Ketua Pengarah Imigresen Malaysia & Ors [2022] 3 MLJ 277, Fc (refd)
SIS Forum (M) v Kerajaan Negeri Selangor (Majlis Agama Islam Selangor, intervener) [2022] 2 MLJ 356; [2022] 1 LNS 218, FC (refd)
Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333, FC (refd)
SK Tangakaliswaran a/l Krishnan v Menteri Dalam Negeri, Malaysia & Ors [2010] 1 MLJ 149; [2009] 6 CLJ 705, FC (refd)
Tamilarasan a/l Subramaniam v Timbalan Menteri Dalam Negeri, Malaysia & Ors [2021] 6 MLJ 147, FC (not folld)
Timbalan Menteri Dalam Negeri, Malaysia & Anor v Awang Sari bin Lasikan (05(HC)-69–04 of 2021(B)) (unreported) (refd)
Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases [2021] 3 MLJ 759, FC (refd)

Legislation referred to

Child Act 2001 s 97
Courts of Judicature Act 1964 Schedule, para 1
Criminal Procedure Code ss 365, 418A
Emergency (Public Order and Prevention of Crime) Ordinance 1969 ss 4(1), 7C, 7D
Federal Constitution arts 3, 4, 4(1), 5, 5(1), (2), 8, 8(1), 9, 10, 10(1), 13, 74(1), 79(3), 121, 121(1), 149, 149(1)(a), (1)(b), (1)(c), (1)(d), (1)(e), (1)(f), 151, 151(1)(a), (1)(b), (2), 159, 159(1), 160(2), Part II, Schedule 9, List I
Immigration Act 1959/63 ss 59, 59A
Interpretation Acts 1948 and 1967 s 54(2)
Land Acquisition Act 2010 s 40D
Penal Code
Prevention of Crime (Advisory Board Procedure) Regulations 2014 reg 8A
Prevention of Crime Act 1959 ss 4, 4(2), (2)(a), (2)(a)(i), (2)(a)(ii), 4A, 10(2), 15B, 19A(1), First Schedule, Part 1, para 2
Rules of the Federal Court 1995 r 137

Appeal from: Criminal Application No BA-44–209–06 of 2020 (High Court, Shah Alam)

Jay Moy Wei Jiun (Jayarubbiny Jayaraj with him) (Jay & Jay) for the appellant.
Shamsul Bolhassan (Muhammad bin Sinti and Farah Ezlin Yusop Khan with him) (Senior Federal Counsel) for the respondents.

Nallini Pathmanathan FCJ:

INTRODUCTION

[1] Every habeas corpus application made to this court brings to the fore the competing concerns of national security and individual liberty, in respect of which the right balance must be achieved, in accordance with the provisions of the Federal Constitution ('the FC') and, from a broader perspective, the rule of law.

[2] The instant appeal involved one Dhinesh a/l Tanaphll. He was the detainee and appellant here ('Dhinesh') who was ordered to be preventively detained at a rehabilitation centre known as Pusat Pemulihan Khas Bentong, Pahang for a period of two years pursuant to a detention order dated 31 October 2019, issued by the Prevention of Crime Board Chairman under s 19A(1) of the Prevention of Crime Act 1959 ('the POCA'). We were not accorded the benefit of sighting the statement of facts or the reasons for his detention under POCA.

[3] Dhinesh sought to secure his release by applying for a writ of habeas corpus pursuant, inter alia, to art 5(2) of the Federal Constitution and s 365 of the Criminal Procedure Code.

CHRONOLOGY OF SALIENT FACTS RELATING TO DHINESH'S DETENTION UNDER POCA

[4] The salient facts relating to his appeal are as follows:

(a) on 4 September 2019, Dhinesh was arrested;

(b) the next day, Dhinesh was brought before a magistrate to be remanded. The magistrate granted an order remanding him for 21 days;

(c) the investigating officer began investigations after that, completing his investigation report on 18 September 2019 and submitting it to the inquiry officer at the Home Affairs Ministry. This report was only submitted to the Crime Prevention Board on 4 October 2019;

(d) on 25 September 2019, Dhinesh was brought before a registrar (sitting as a magistrate) for his remand order to be extended. The registrar granted an order for a further 38 days of remand until 1 November 2019;

(e) the inquiry officer carried out a physical inquiry on 2 October 2019. The inquiry officer found that Dhinesh ought to be registered under para 2, Part 1 of the First Schedule of the POCA and prepared a report pursuant to s 10(2) of the POCA, submitting it to the Crime Prevention Board on 25 October 2019;

(f) the Crime Prevention Board sat on 30 and 31 October 2019. On 30 October 2019, the Crime Prevention Board affirmed the findings of the inquiry officer and informed the registrar to duly register Dhinesh. The next day, Chairman of the Crime Prevention Board issued a detention order dated 31 October 2019 against Dhinesh under s 19A(1) of the POCA;

(g) on 1 November 2019, Dhinesh was brought to the detention centre. On the same day, he filled in the representation form and the centre had it faxed to the Advisory Board;

(h) as that day happened to be a Friday and the form was received in the late afternoon, the official acknowledgement of receipt was dated the following Monday, 4 November 2019;

(i) on 10 December 2019, the Advisory Board ('Board') heard Dhinesh's representation;

(j) the Board sent their recommendations to the Yang di-Pertuan Agong ('YDPA') on 14 December 2019. It was brought before the YDPA on 28 December 2019;

(k) on 30 December 2019, the YDPA accepted the recommendation of the Board and ordered that Dhinesh continue to be held in detention; and

(l) Dhinesh then applied to be released from such detention. His application before the High Court was rejected and he appealed.

JUDGMENT

[5] We heard the appeal on 15 September 2021 and granted the remedy of habeas corpus on 1 October 2021. We issued a brief judgment when doing so in the following terms:

> This is our unanimous decision. We order that habeas corpus be issued, inter alia, on the following grounds:
>
> (i) there is non-compliance with s 4(2) of the Prevention of Crime Act 1959 ('the POCA') because the order of the magistrate did not indicate that a

statement from the public prosecutor was produced before the magistrate when she ordered the 38-day remand as is required under s 4(2)(a)(ii);

(ii) the writ of habeas corpus is not academic following this court's decision in *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases* [2021] 3 MLJ 759; [2021] 5 CLJ 581 ('Zaidi bin Kanapiah');

(iii) on the refusal by the Board's Chairman to call the appellant's witness, Mathan Raj which amounts to a breach of natural justice and a procedural irregularity;

(iv) as is trite, it is incumbent upon the respondent to prove compliance with the law. As such, it would have been a simple matter for the respondent to produce the minutes of the Board of Inquiry which would have provided a contemporaneous note of what transpired. That would have resolved the conflicting accounts of the parties. The relevant confidential matters relating to security could have been redacted or held in camera as has been stated in other case law;

(v) on *Tamilarasan a/l Subramaniam v Timbalan Menteri Dalam Negeri, Malaysia & 2 Others* (Federal Court Criminal Appeal No 05(HC)-11–01 of 2021(B)) ('Tamilarasan') this court decided that the issue of delay does not arise as long as the relevant reports are submitted within the 60-day period as specified under the law. We are unable to agree with that reading of the law and prefer the reasoning in *Chua Kian Voon v Menteri Dalam Negeri Malaysia & Ors* [2020] 1 MLJ 351; [2020] 1 CLJ 747 (FC). ('Chua Kian Voon') However, on the facts of this case, we are satisfied that there was a proper explanation given for the time taken to submit the reports; and

(vi) there are other grounds which were argued by the parties which we shall expand upon in our full written grounds which will be delivered at a future date. We say this in fairness to the parties who have expended time and effort on these issues.

[6] We now provide our full grounds below. It is convenient to commence with a brief consideration of the background to preventive detention legislation in this jurisdiction.

PREVENTIVE DETENTION LEGISLATION IN THIS JURISDICTION — A BRIEF HISTORY

[7] Preventive detention describes the practice of incarcerating individuals without a trial. Preventive detention practices are a legacy of British colonial rule when such laws were utilised to counter forces like armed communist insurgencies.

[8] The Federal Constitution ('the FC') was crafted at a time when just such an emergency was subsisting. As explained by Professor Yvonne Tew in

'Constitutional Statecraft in Asian Courts' — 'Historical context provides some explanation for these constitutional emergency and security regimes'. The 1948-armed insurgency by the Malayan Communist Party forced the then government to proclaim the country's first state of emergency which remained in force when Malaya became independent in August 1957. It ended in 1960. As such the drafting of the Constitution was accomplished in this environment which explains the inclusion of arts 149 and 151 of the FC. As further explained by the learned author by reference to the Reid Commission Report — the authors of the report stated that it was necessary to 'take note of the existing emergency' and as such they recommended the inclusion of constitutional emergency and special powers in order that state safety was prioritised and the democratic way of life preserved. However, an important proviso was that such powers 'should be limited and defined'. It was emphasised in the Reid Constitutional Report that the infringement of fundamental rights (guaranteed under the FC) 'is only justified to such an extent as may be necessary to meet any particular danger which threatens the nation'.

[9] It is evident that these special emergency powers are specifically crafted for dangers against the nation, in stark contrast to the criminal legislation promulgated by Parliament to address criminal offences, which while grave, cannot be said to pose a threat to the security of the nation or the peace ful and democratic way of life of the citizens of the nation, as a whole. The distinction is obvious.

THE SPECIAL POWERS CONFERRED ON PARLIAMENT UNDER ART 149 OF THE FC

[10] Article 149 of the FC is in itself clear in the use of its plain and categorical language, that any such legislation should be promulgated by Parliament only for the specific range of matters set out in limbs (1)(a)–(f) of the said article. It stipulates:

> 149(1) If an Act of Parliament recites that *action has been taken or threatened by any substantial body of persons*, whether inside or outside the Federation —
>
> (a) to cause, or to cause *a substantial number of citizens to fear, organized violence against persons or property*; or
>
> (b) to *excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation*; or
>
> (c) to *promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence*; or
>
> (d) to *procure the alteration, otherwise than by lawful means*, of anything by law established; or

A (e) which is *prejudicial to the maintenance or the functioning of any supply or service to the public* or any class of the public in the Federation or any part thereof; or

(f) which is *prejudicial to public order in, or the security of*, the Federation or any part thereof,

B any provision of that law designed to stop or prevent that action *is valid notwithstanding that it is inconsistent with any of the provisions of* Article 5, 9, 10 or 13 or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill. (Emphasis added.)

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[11] The tenor of art 149 of the FC is such that several conditions need to be met in order to invoke the enactment of such legislation. It follows that such legislation, when enacted and applied, must conform with the limits set out in D art 149 of the FC. The limitations and parameters set out there should be strictly complied with. These conditions include the following:

(a) there must be action taken or threatened by a substantial body of persons (see *Selva Vinayagam a/l Sures v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2021] 1 MLJ 601; [2021] 2 CLJ 29); E

(b) if the legislation is promulgated, as is POCA, under limb (1)(a) it is necessary that a *substantial number of citizens fear organized violence against their person or property*. Taken in totality, this means that *a substantial body of persons is causing a substantial number of citizens to fear organized violence against their person or property*; and F

(c) similarly, the conditions spelt out in each of the other limbs from (1)(b)–(f) should also be strictly met.

G **[12]** It is untenable to utilise the extreme measures set out in legislation enacted pursuant to art 149 of the FC, to deal with criminal offences which are more properly dealt with under the Penal Code, and other relevant legislation. It is incorrect to turn to emergency legislation to deal with ordinary criminal offences in order to procure further evidence, or because there is insufficient H evidence to prosecute a person under the relevant criminal legislation dealing with that particular crime.

[13] This in turn is because legislation enacted pursuant to art 149 of the FC, such as POCA, permits for non-conformity of such legislation with selected I articles in Part II of the FC dealing with fundamental liberties, due to the grave threat posed by such subversive action. This includes non-compliance or inconsistency with arts 5, 9, 10 and 13 of the FC. Foremost amongst this is the permitted incarceration of individuals without trial under art 5(1) of the FC, as stated at the outset. Put shortly, the individual who is preventively detained is

not afforded the opportunity of a full and fair trial as guaranteed under the FC. A

[14] This underscores the need to ensure that POCA and other such legislation promulgated under art 149 of the FC is not abused.

[15] As recognised by the FC in, inter alia, arts 5(2) and 4, the role of ensuring that a person is neither unlawfully nor illegally detained under special emergency legislation enact ed pursuant to art 149 of the FC, such as POCA, falls on the Judiciary. B

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IS THERE ANY REDRESS AGAINST PREVENTIVE DETENTION LEGISLATION?

[16] What then is the redress afforded to persons detained under such emergency and special measures preventive detention legislation? After all art 149 of the FC expressly allows for legislation such as POCA to be valid notwithstanding its inconsistency with art 5 (and 9, 10 as well as 13) of the FC. D

[17] The answer lies in art 5(2) of the FC, which makes it incumbent upon the Judiciary, more particularly the High Court or a judge of the High Court to inquire into a complaint by any person so preventively detained, and to release him unless satisfied that the detention is lawful. E

[18] But, it might be said, art 5(2) of the FC is part of art 5 of the FC, and art 149 of the FC expressly permits legislation such as POCA to be inconsistent with art 5 of the FC. F

[19] However, there is *no suspension of* art 5(2) of the FC under art 149 of the FC. What this means is that while legislation like POCA, which is enacted pursuant to art 149 of the FC remains constitutionally valid notwithstanding its inconsistency with art 5 of the FC, the right to question the legality of such detention and to have a court review such detention for legality, is neither taken away nor suspended. The right to have the legality of such detention reviewed by a court even in times of emergency or subversion as envisaged under art 149 of the FC, is a constitutionally embedded right under art 5(2) of the FC. G H

[20] Further, arts 4 and 8 of the FC are not alluded to in art 149 of the FC, meaning that the relevant legislation cannot contravene arts 4 and 8 of the FC. This means that the fundamental characteristics or features, or the basic structure of the FC must be complied with, as should the doctrines of proportionality and equality embodied in art 8 of the FC. This is consonant with international law on according all detainees the right of judicial redress. I

[21] In a nutshell, the basis for the remedy of the issuance of a writ of habeas corpus, which is founded on art 5(2) of the FC:

(a) is not expressly excluded by art 149 of the FC;

(b) expressly confers a right of *constitutional review on the High Court* to review the legality of the detention; and

(c) expressly confers a right of 'satisfaction' on the part of the High Court, to the effect that the court must itself be convinced that the detention is lawful.

[22] The latter aspect, namely the right to determine to its satisfaction that the detention is lawful, means that the court can undertake a review to satisfy itself that the preventive detention is legally certain, not arbitrary, and is proportionate. That is a wide power.

[23] Finally, this constitutional right of redress in art 5(2) of the FC against preventive detention ought not to be conflated with the writ of habeas corpus as understood by the original remedy in the United Kingdom which took its roots from the Magna Carta. The conflation arises thus: if emphasis is given only to the writ of habeas corpus then the natural tendency will be to follow only jurisprudence underlying that remedy. Whereas in this jurisdiction, there exists a substantive constitutional right of review under our FC which gives wide powers to a court of law to ascertain the legality of any detention, and consequently the power of release.

[24] Such a broad feature of the FC ought not, and cannot, be ignored in favour of jurisprudence focused more narrowly and rigidly on the remedy of habeas corpus per se. It must be said that the remedy in the United Kingdom today is indeed broad and all-encompassing, as is borne out by the case law in that jurisdiction.

[25] Notwithstanding this, the continued reliance on case law from differing jurisdictions, has led to misconceptions on when and how this remedy is available in this jurisdiction, ranging from precluding the constitutional right of review under art 5(2) of the FC when the physical detention of a complainant has ceased. This has resulted from the legal rationale that once the physical detention is over, the remedy of habeas corpus no longer subsists. Such a conclusion is flawed in the face of the express provisions of art 5(2) of the FC (see *Lei Meng v Inspektor Wayandiana bin Abdullah & Ors and other appeals* [2022] 3 MLJ 203).

[26] Simply put, the constitutional right to redress against detention in this jurisdiction under art 5(2) of the FC, is considerably wider and consonant with

international law as prescribed, inter alia, by the United Nations and the European Convention on Human Rights. And such wide powers of constitutional review have been embedded in our FC from its inception.

[27] As is evident from the brief judgment issued when we made our decision, the issues that fell to be considered included:

(a) non-compliance with s 4(2) of the POCA when the magistrate did not consider the statement by the deputy public prosecutor extending Dhinesh's remand for a further 38 days;

(b) whether the failure or refusal by the Board to facilitate the procuring of a witness required by Dhinesh at his representation hearing amounted to a denial of a fair trial and was contrary to reg 8A of the Prevention of Crime (Advisory Board Procedure) Regulations 2014 and art 151 of the FC;

(c) delay by the investigating officer in preparing and submitting Dhinesh's full investigation report under s 4A of the POCA, resulting in prejudice to him; and

(d) delay by the inquiry officer in submitting his complete inquiry report under s 10(2) of the POCA to the Prevention of Crime Board.

ADDITIONAL SUBMISSIONS REQUESTED ON THE CONSTITUTIONAL VALIDITY OF S 15B OF THE POCA — AN OUSTER CLAUSE

[28] Prior to the hearing of this appeal and the decision, this court requested counsel to file additional submissions on the following issue, namely the constitutionality of s 15B of the POCA and whether the section violates art 4(1) read together with art 121(1) of the FC. When delivering our judgment with brief grounds, we stated that we would consider this issue in greater detail in our full written grounds.

[29] We shall consider the constitutionality of s 15B of the POCA, namely the ouster clause in POCA first. It is pertinent that we do so at the outset, because this issue is determinative of whether executive and administrative decision-making pursuant to express powers conferred in specific provisions of legislation enacted at the behest of Parliament, are immune from the consideration of the courts by reason of the subsistence of ouster clauses in such legislation.

SECTION 15B OF THE POCA — AN OUSTER CLAUSE

[30] Section 15B of the POCA provides:

A 15B(1) There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Board in the exercise of its discretionary power in accordance with this Act, except in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.

B (2) In this Act 'judicial review' includes proceedings instituted by way of —

(a) an application for any of the prerogative orders of mandamus prohibition and certiorari;

(b) an application for a declaration or an injunction;

C (ba) a writ of habeas corpus; and

(c) any other suit, action or other legal proceedings relating to or arising out of any act done or decision made by the Board in accordance with this Act.

D **[31]** The net effect of this statutory provision in s 15B of the POCA is to seek to prohibit any form of review of the decision of the Prevention of Crime Board, save for any question arising in relation to procedural non-compliance with any provision of POCA. It is pertinent that the statutory provision not only curtails any form of effective judicial review, but actually stipulates that no E court 'shall have' nor shall 'exercise any jurisdiction' in respect of a decision by the Board.

[32] What this means is that s 15B purports to delineate the jurisdiction of F the courts of the nation, and confine judicial power in relation to the executive decision-making power of the Prevention of Crime Board ('Board'). It seeks to abrogate, limit and restrict judicial powers in relation to preventive detention under POCA, by immunising any and all decisions of the Board from judicial scrutiny, save for procedural irregularities. There is no doubt that an abrogation G of judicial power is prevalent in the section, as it curtails judicial power in relation to issues to be examined in relation to preventive detention, save for issues relating specifically to compliance with the procedure outlined in POCA itself.

H **[33]** That in effect means a failure to follow required procedures as set out in the statute, here POCA. This means that judicial scrutiny of an executive decision to detain under POCA is limited to the narrow range of a failure to follow required procedures as stipulated in POCA itself.

I **[34]** This restriction has relegated the function of the Judiciary to monitoring the manner and mode in which the process of preventive detention is carried out, for example in counting the number of days for each stage of the

procedure. Or whether a particular form has been signed by the detainee or not. Judicial scrutiny has, via such an ouster clause, been relegated to nothing less than a clerical function.

[35] This is borne out by case law such as *Lee Kew Sang v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2005] 2 MLJ 631; [2005] 3 CLJ 914 where this court speaking through Abdul Hamid Mohamad FCJ (later Chief Justice) held, inter alia, as follows in relation to ss 7C and 7D of the Emergency (Public Order and Prevention of Crime) Ordinance 1969, amendments incorporated vide the Amendment Act 740, which introduced ouster clauses into this Ordinance, ousting the jurisdiction of the courts to exercise powers of judicial review over such decisions made by the Executive, save for procedural irregularities within the then Ordinance. In holding that the effect of these amendments was that the detention order made by the Minister under s 4(1) of the Ordinance could only be challenged on the ground of non-compliance with any procedural requirement and nothing else, it was held:

> ... In our view, courts must give effect to the amendments. That being the law, it is the duty of the courts to apply them. So, in a habeas corpus application where the detention order of the Minister made under s 4(1) of the Ordinance or, for that matter, the equivalent sections in ISA 1960 and DD (SPM) Act 1985, the first thing that the courts should do is to see whether the ground forwarded is one that falls within the meaning of procedural non-compliance or not. To determine the question, the courts should look at the provisions of the law or the rules that lay down the procedural requirements. It is not for the courts t o create procedural requirements because it is not the function of the courts to make law or rules. If there is no such procedural requirement then there cannot be non-compliance thereof. Only if there is that there an be non-compliance thereof and only then that the courts should consider whether on the facts, there has been non-compliance ...

[36] Can the power of judicial review of the Judiciary be so restricted to purely a review of procedural irregularities as stipulated by such Acts?

DOES THE FC ALLOW FOR JUDICIAL POWERS TO BE SO CONSTRAINED?

[37] The question that then arises for consideration is whether the role and powers of the Judiciary can be so critically abrogated in the context of the Federal Constitution.

[38] Section 15B is a statutory provision within POCA, enacted pursuant to art 149 of the FC as we have explained at the outset. The larger issue that arises is whether legislation under art 149 of the FC can ignore and infringe the provisions of the FC relating to judicial power and function. Put another way, is such a statutory provision constitutionally valid?

[39] If s 15B is valid and constitutional, it means that the courts' powers of judicial review in relation to detention, as enshrined in art 5(2) of the FC and its powers of review to ensure coherence or adherence to the provisions of the FC under art 4(1) of the FC are effectively rendered nugatory. In point of fact, it means that legislation passed by Parliament whether under the special powers in art 149 of the FC or otherwise, can supersede, contravene and override fundamental constitutional safeguards within the FC.

[40] If s 15B is unconstitutional and therefore invalid, then it follows that judicial power as enshrined in art 5(2) of the FC to determine the legality of a detention remain in place. More importantly it endorses the powers of the Judiciary to maintain its role as the check and balance against the Executive and Legislature under the doctrine of the separation of powers as encapsulated in art 4(1) of the FC.

[41] We have explained that POCA, as enacted pursuant to art 149 of the FC remains constitutionally valid, notwithstanding its inconsistency with arts 5, 9, 10 and 13. In other words, the constitutionality of POCA is preserved. However, art 149 of the FC neither suspends nor removes art 5(2) of the FC. This article expressly confers upon the Judiciary the constitutional right of review of detention to ascertain the legality of such detention.

[42] *There is a distinction between providing that specific legislation remains valid notwithstanding its inconsistency with specific provisions of the FC on the one hand, and actually suspending a specific provision under the FC on the other.*

[43] *While the former preserves the constitutional validity of legislation enacted pursuant to the special powers provision in the FC and no more, the latter actively seeks to take away a constitutional safeguard afforded by the Federal Constitution. Whether the latter can actually be done is moot, given the subsistence of art 4(1) of the FC.*

[44] The point however is that *neither art 149 of the FC nor POCA fall within the latter category as there is no check or hold put on art 5(2) of the FC. There is no suspension of the constitutional right of review of such detention*. As such, as explained at the outset, a detainee preventively detained under POCA can apply for release under the provisions of art 5(2) of the FC. That forms the basis for the remedy of release or the issuance of a writ of habeas corpus. The availability of habeas corpus is found in Schedule to the Courts of Judicature Act 1964 as a remedy available for an infringement of the fundamental liberties enshrined in Part II of the FC (see the Reid Commission report as well as *Koperal Zainal bin Mohd Ali & Ors v Selvi a/p Narayan (joint administrator and dependant of Chandran a/l Perumal, deceased) & Anor* [2021] 3 MLJ 365; [2021] 6 CLJ 157).

[45] Equally significantly, art 149 of the FC neither precludes nor ousts art 4 of the FC. Article 4 of the FC is not mentioned. The constitutionally entrenched right to review s 15B is therefore available.

THE DECISIONS OF THIS COURT IN MARIA CHIN ABDULLAH V KETUA PENGARAH IMIGRESEN & ANOR [2021] 1 MLJ 750 ('MARIA CHIN') AND ROVIN JOTY A/L KODEESWARAN V LEMBAGA PENCEGAHAN JENAYAH & ORS AND OTHER APPEALS [2021] 2 MLJ 822; [2021] 4 CLJ 1 ('ROVIN JOTY')

[46] This issue of the constitutional validity of an ouster clause has been considered by this court in both *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 1 MLJ 750 and *Rovin Joty a/l Kodeeswaran v Lembaga Pencegahan Jenayah & Ors and other appeals* [2021] 4 CLJ 1; [2021] 2 MLJ 822. In both instances a majority of the coram involved held that ouster clauses such as s 15B of the POCA are constitutionally valid. The minority and dissenting views were that such an ouster clause is invalid.

[47] *Rovin Joty* has however recently been quashed upon review under r 137 of the Rules of the Federal Court, on the grounds of a breach of natural justice, in that the majority judgment there addressed issues that were not in dispute between the parties, resulting in parties being precluded from addressing the court on these fundamental findings. To that extent the decision there is no longer binding on any court. Therefore, the conclusion that the ouster clause in s 15B of the POCA is constitutionally valid, is no longer good law.

[48] In *Maria Chin* an ouster clause, similar in nature to s 15B of the POCA, namely s 59A of the Immigration Act 1959/63 ('the Immigration Act') was held, again by a majority, to be constitutionally valid.

[49] In view of the similarity in the nature of the ouster clause in *Maria Chin*, it is necessary to consider the decisions of the majority of the coram to ascertain whether, and how, the majority judgment impacts on the current judgment.

THE MAJORITY JUDGMENT IN MARIA CHIN — THE PRINCIPAL JUDGMENT AND THE CONCURRING JUDGMENT

[50] The two judgments comprising the majority, include a principal judgment and a concurring judgment. These two judgments while stated to be in full support of each other, differ on fundamental principles as a full reading of the same will bear out. In this context, both the appellant and the respondent have submitted on the case of *Maria Chin* and the majority judgment at some length. In issue is the ratio decidendi to be gleaned from these two judgments, namely the principal and the concurring judgment.

A THE PRINCIPAL JUDGMENT COMPRISING A PART OF THE MAJORITY JUDGMENT IN MARIA CHIN

[51] The principal judgment covers a myriad of issues relating to judicial power under the FC. It is not tenable to set out the entirety of the same here. With respect, I summarise the primary issues and conclusions relevant to this appeal, which are as follows:

(a) art 4(1) of the FC safeguards the supremacy of the FC by preventing Parliament from enacting any law it pleased. However, the provision only came into play where there is inconsistency between any post-Merdeka law and the FC. *Article 4(1) of the FC had no nexus with judicial power, which was solely concentrated in art 121 of the FC and nowhere else. The question for consideration by the Court for the purposes of art 4(1) was whether s 59A of the Immigration Act ('s 59A'), namely the ouster clause was inconsistent with art 4(1) of the FC and not whether it was inconsistent with the doctrine of the separation of powers*;

(b) *s 59A was enacted pursuant to art 121(1) of the FC*. It was not enacted pursuant to any other article of the FC which it could be inconsistent with, and thereby void under art 4(1) of the FC. Articles 5(1), 8(1) and 10(1) of the FC were of no relevance as no reference had been made to these constitutional provisions in the leave questions. It was incorrect to argue that s 59A was void not because it was inconsistent with art 121(1) of the FC but those stated articles;

(c) *the answer to whether s 59A is constitutionally valid or not depends on whether Parliament was vested with power under art 121(1) to enact s 59A. As art 121(1) sanctioned the enactment of s 59A it was a valid clause which could not be struck down under art 4(1) of the FC*;

(d) art 4(1) of the FC could only render s 59A void if the latter was inconsistent with any constitutional provision that conferred it with legitimacy and force of law. It was art 121(1) of the FC and no other article that gave s 59A its legitimacy and force. Therefore, the only way in which s 59A could be void is if it was shown to be inconsistent with art 121(1) FC. The appellant, ie *Maria Chin* had only stated that s 59A violated the doctrine of the separation of powers, which it was contended, was a 'basic structure' of the FC;

(e) art 4(1) of the FC could not be invoked to strike down just any post-Merdeka law that was inconsistent with just any article of the FC. The article that the post-Merdeka law was inconsistent with must relate to the relevant subject-matter and legislative scheme of the impugned law that was sought to be declared void. In like manner art 4(1) could not be invoked to strike down any law that was inconsistent with itself as art 4(1) did not operate by itself and on its own but was a mechanism to

declare any post-Merdeka law void for being inconsistent with any other relevant article of the FC; A

(f) the source of judicial power in the Federation was solely art 121(1) and no other. It provided that the courts had such jurisdiction and powers 'as may be conferred by or under federal law'. In the present case s 59A stipulated that the role of the courts was limited to reviewing only procedural non-compliance and not the substantive decision. Any attempt to ignore the limitation placed by s 59A under the doctrines of separation of powers and judicial independence, would defy art 121(1) of the FC, which the courts were not at liberty to do. And this in turn was because federal laws had stipulated to the courts that they could not do so and could only adjudicate, in immigration matters, on procedural non-compliance. The High Courts had no jurisdiction to travel outside the confines of what was stipulated in s 59A; B C D

(g) art 121(1) of the FC could not be suborned to doctrines such as the Indian doctrine of basic structure and the common law doctrine of separation of powers. No doctrine of law could override art 121(1) of the FC. Therefore, the question of the express terms of art 121(1) of the FC being in violation of the doctrines of basic structure and separation of powers did not arise; E

(h) the view taken in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 ('Semenyih Jaya') was that art 121(1) of the FC was manifestly inconsistent with art 4(1) of the FC. In answer to this, it was to be noted that for the application of art 4(1) of the FC, a distinction had to be drawn between ordinary laws enacted in the ordinary way and Acts of Parliament that affected the FC, ie ordinary legislation and legislation amendment acts. It was only federal law ie ordinary legislation that was encompassed by art 4(1) of the FC. As such art 4(1) of the FC had no application when it came to constitutional amendment acts; F G

(i) in a country where the constitution was supreme as is the case in Malaysia, judicial review could still be excluded by an Act of Parliament and the court would uphold such law provided the law was drafted in explicit and clear language. It was within the competence of Parliament to legislate so, given art 121(1) of the FC. Therefore, s 59A was not void under art 4(1) of the FC for being inconsistent with art 121(1) of the FC; H

(j) the cases of *Semenyih Jaya*, *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 ('Indira Gandhi') and *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1; [2019] 5 CLJ 780 ('Alma Nudo'), were distinguished because none of the judgments stipulated that art 121(1) I

of the FC had no force of law to confer on Parliament the power to enact ouster clauses such as s 59A. The whole integrity of the FC would be undermined if the courts were to disregard the limitations imposed by Parliament which represented the will of the people through s 59A Immigration Act; and

(k) ss 59 and 59A were not void for being inconsistent with art 4(1) read with art 121(1) of the FC. The limitation of the court's judicial review power by s 59A fell squarely within the power of Parliament to legislate pursuant to the power conferred on it by art 121(1) of the FC and was not in breach of the separation of powers, which could not in any case prevail over the written constitution. However, on the peculiar facts and circumstances of the case, in particular the reason given by the Director General of Immigration for imposing the travel ban, which turned out to be inappropriate, the discretion was not unfettered.

[52] The principal judgment expressed complete agreement with the second concurring judgment. The concurring judgment in turn expressed complete agreement with the principal judgment.

THE CONCURRING JUDGMENT COMPRISING A PART OF THE MAJORITY JUDGMENT IN MARIA CHIN

[53] I shall make reference to that part of the concurring judgment that dealt with the constitutional validity of s 59A as well as s 59 of the Immigration Act:

(a) the argument is this — that s 59A is unconstitutional because it impinges on the *judicial power of the court as enshrined in art 121 and safeguarded by art 4.* There was no reason to doubt the constitutionality of *s 59A as it was not couched in absolute or total terms, offending art 4(1) of the FC or even art 121, as discussed and understood in the various recent decisions of this court. Its validity was saved by its own express limitations which the court had read and applied with much circumspection. The provision did not inhibit the power of the court to intervene, examine and/or set aside any decision made under the Immigration Act*;

(b) if at all the validity of s 59A arises it does so as it only provides for a procedural oversight of the respondents' decisions or actions and does not allow the courts to exercise their supervisory jurisdiction by judicially reviewing the decision or action on its substantive merits;

(c) there was no need to address the issue of the constitutionality of s 59A because that would amount to an overkill. Section 59A is law that Parliament is entitled to enact under the powers of legislation as found in art 121(1) of the FC;

(d) procedural requirements in s 59A ought not to be given a narrow

construction. The wider grounds of procedural impropriety and proportionality are legal principles that the courts and legal counsel employ to examine a decision; to reason why a decision is proper or otherwise. *These reasonings and principles can never be abrogated or abolished by a stroke of a pen in any statute without offending the principles of constitutional supremacy for the reasons already discussed in the trilogy of decisions of the Federal Court*;

(e) how the court is to deal with the complaint when approached for the exercise of its supervisory jurisdiction is not a matter which is spelt out or can be dictated by the terms of s 59A. *The power, authority or jurisdiction is provided for in art 121 read with art 4 and more specifically, in the Courts of Judicature Act 1964. It is in those sources that the court takes its power and jurisdiction including inherent power; and it is through legal reasoning and jurisprudence that the court determines whether its powers within its supervisory jurisdiction would be engaged in any particular cause.* The common law principles of reasoning such as the rules of natural justice, the *audi alteram partem* rule, the principles of impropriety, illegality, irrationality and unreasonableness as well as mala fides, abuse of process are principles that can be accommodated and applied;

(f) in an application for judicial review the court exercises its supervisory jurisdiction and in such exercise the merits are not of primary concern. It is the process or the procedure that is scrutinised. And in determining whether those processes or procedure have been complied with, the courts use, amongst others, its powers and tools of principles and reasoning to reach its answer. It is not a mechanical, passive or grammarian task. Therefore, there is nothing unconstitutional or invalid in s 59A;

(g) the doctrine of the separation of powers is expressly recognised and accepted as an imperative part of the FC, at para 712 of the concurring judgment where it is stated that:

> The doctrine of the separation of powers and that the court, as respecter of that doctrine, proceeds on the basis that the Legislature, Parliament, often said to have acted or decided in its wisdom, has seen fit to enact such legislation in those precise terms for whatever its reasons and that those reasons have been debated and have passed … to become law or part of the law of this great nation. It is however, entirely the role and within the sole jurisdiction and power of the courts to give expression to the intention of Parliament as properly discerned from the wordings found in the ouster clause; what exactly is the impact and ambit of such clauses — see *Abdul Razak bin Baharudin & Ors v Ketua Polis Negara & Ors and another appeal* [2006] 1 MLJ 320.

This full acceptance of the doctrine of the separation of powers does not sit well with the decision in the principal judgment that rejects the

same. At para 713 of the concurring judgment:

> ... Another reason why this approach is adopted is this — the presence of ouster clauses, finality clauses or even the argument of non-justiciability have never deterred the court from examining any decision, dispute or complaint that is referred to the court. Again, the law reports are filled with high authorities on how these 'barriers' have been treated by the court and that it is really in the narrow area of policy, especially foreign policy and international relationships, public order and security, internal matters taken by the various State Legislative Assemblies, that the court may decline intervention. Even then, it would be after the court has satisfied itself that the subject matter is properly within the jurisdiction of the relevant authority.

In short, the concurring judgment accepts the inherent supervisory power of the courts to review federal law, notwithstanding the apparently strict and narrow rigidity of art 121(1) of the FC which restricts the court's powers to those conferred by or under federal law. This is in direct contradistinction to the principal judgment;

(h) at para 714 of the concurring decision there is acceptance of the decisions in *Semenyih Jaya* as well as *Indira Gandhi*, unlike the position adopted in the principal judgment:

> ... The recent decisions of *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 (*Semenyih Jaya)*, *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 (*Indira Gandhi*) and *The Speaker of Dewan Undangan Negeri of Sarawak Datuk Amar Mohamad Asfia Awang Nassar v Ting Tiong Choon & Ors and other appeals* [2020] 4 MLJ 303 ... amply illustrate this point. See also *Metramac Corp Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd* [2006] 4 MLJ 113, *and Hotel Equatorial (M) Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1984] 1 MLJ 363 (*Hotel Equatorial*) ...

(i) the concurring judgment went on to consider the application of *Hotel Equatorial* in *Indira Gandhi* and quoted extensively from the latter decision effectively accepting the decision *in toto*. This is borne out by the quote from *Indira Gandhi* at paras [132] and [133] of *Indira Gandhi* itself, that the relevant clause:

> cannot have the effect of excluding the court's powers of judicial review over the registrar's issuance of the certificates. It goes on to state categorically that the supervisory jurisdiction of courts to determine the legality of administrative action cannot be excluded even by an express ouster clause. And this in turn was because it would be repugnant to the rule of law and the judicial power of the courts if the registrar's decision is immune from review, even in light of uncontroverted facts that the registrar had no jurisdiction to make such a decision ...

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> And further on, it is stated that it is not tenable to stop the court from exercising its supervisory powers at the very threshold of the scrutiny.

These statements in the concurring judgment amount to a full acceptance of the extensive powers of the court beyond that stipulated in art 121(1) of the FC as suggested in the principal judgment. It also goes on to show that there was acceptance of the doctrine of the basic structure. There is therefore a clear and distinct difference in the legal propositions and conclusions put forward in the principal and concurring judgments;

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(j) where the Immigration Act applies (the contention was that the Act was not applicable in the appeal) the right to be heard is intrinsic to the whole fabric of the administration of justice where the rule of law demands that there must always be fair play. *In the exercise of its supervisory jurisdiction, the courts too have never been deterred by provisions of law which do not require that reasons for decisions be given whether it is to enable an appeal to be undertaken or simply for the person affected to know.* It has evolved into a norm that the rules of natural justice require reasons to be provided;

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(k) in relation to the right to be heard under the Immigration Act, before a decision is rendered in respect of any matter under consideration the rules of fair play require that an accused be informed of the complaints against him and that he has an opportunity to explain, if he so wishes, before a decision is taken;

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(l) there is no doubt that *the actions or decisions of the respondents as subordinate bodies statutorily conferred specific powers must come under the supervisory jurisdiction of the courts; that Parliament could not possibly leave such bodies or authorities free to do as they please* and that in making any decision concerning a citizen as to his right to depart the country that person should in accordance with the principles of natural justice be accorded an opportunity to be heard; and

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(m) the right to be heard is a basic provision that the courts have always recognised. Even where such provisions exist the courts may still impeach that decision on the ground that the opportunity to be heard was not a real, proper or effective hearing and that there has been a breach of natural justice.

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[54] Notwithstanding these statements of the law the conclusion reached is that both s 59 which ousts the right to be heard and s 59A which ousts the jurisdiction and power of the courts to scrutinise any statutory provision or act or omission of an executive decision is both valid and constitutional.

A WHAT IS THE RATIO TO BE GLEANED FROM THE PRINCIPAL JUDGMENT AND THE CONCURRING JUDGMENT IN MARIA CHIN?

B **[55]** The principal judgment maintains that the entirety of judicial power is contained solely, and only in art 121(1) of the FC. Article 4(1) of the FC, it is categorically stipulated, has nothing to do with judicial power.

C **[56]** The concurring judgment on the other hand maintains that s 59A is valid and constitutional because it does not contravene either art 121(1) of the FC or art 4 of the FC. It follows that the concurring judgment endorses the subsistence of judicial power in art 121(1) of the FC and the safeguarding of such judicial power in art 4(1). This means that it is accepted that judicial power in the FC is not limited to such power as is 'conferred by or under federal law'. This is in stark contrast to the principal judgment.

D **[57]** The principal judgment rejects and distinguishes the decisions of this court in *Semenyih Jaya* and *Indira Gandhi*, more particularly in relation to the source, nature and ambit of judicial power. It adopts the reasoning taken in *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1; [2007] 6 CLJ 341 ('Kok Wah Kuan'), which was effectively overruled in *Semenyih Jaya* and *Indira Gandhi*. In short, the principal judgment restricts judicial power to that prescribed or conferred by or under federal law rendering the Judiciary subordinate to Parliament.

E **[58]** This is not so in the case of the concurring judgment which clearly, from the passages cited above, accepts that judicial power extends beyond that under federal law, as borne out by the court's supervisory powers of review, which cannot operate to stop the court from exercising such review at a threshold stage. This points to a clear demarcation in the legal reasoning between the two judgments.

F **[59]** The concurring judgment also accepts and endorses the recent decisions of this court in *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo*. By so doing, it follows that the basic structure doctrine is not rejected outright.

G **[60]** The latter is in contrast to the principal judgment, which both distinguishes and disagrees fundamentally in principle, with the judgments in *Semenyih Jaya* and *Indira Gandhi* in substance, if not literally, as may be gleaned from the summary set out above.

H **[61]** In the principal judgment, the disagreement with the two seminal cases in the principal judgment lies in the ratio of *Semenyih Jaya* and *Indira Gandhi* — namely, that judicial power extends beyond that specified 'by or under

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federal law' as stipulated in art 121(1) of the FC. Further that given the supervisory powers of the courts vis a vis federal law, and the doctrine of the separation of powers, the Judiciary is not suborned to Parliament.

[62] There is disagreement with the fundamental proposition that art 4(1) of the FC safeguards such judicial power. This is evident from the statement that art 4(1) of the FC only applies to 'ordinary legislation and legislation amendment acts' but had no application to 'constitutional amendment' acts.

[63] This again is in stark contrast to the concurring judgment which accepts and endorses the full jurisdiction of the courts and judicial power as spelt out in *Semenyih Jaya* and *Indira Gandhi*. Similarly, there is acceptance of the doctrine of the separation of powers, as pointed out above.

[64] The principal judgment makes the unique proposition that the constitutional validity of a statutory provision ousting the jurisdiction of the courts can only be tested against art 121(1) of the FC in isolation. It cannot be tested against any other provisions of the FC, or art 4(1) of the FC itself. This runs awry of the accepted mode of ascertaining whether a particular statutory provision is inconsistent with any other provision in the FC. That is the express wording of art 4(1) of the FC.

[65] However, the net effect of the principal judgment is that a statutory provision such as s 59A which is an ouster clause cannot even be scrutinised under art 4(1) of the FC. It is limited to scrutiny, if at all, under art 121(1) of the FC only.

[66] This is in contrast to the concurring judgment which appears to accept that such scrutiny is not confined to art 121(1) of the FC only, but also art 4(1) of the FC, as the latter is accepted as safeguarding judicial power.

[67] The fundamentally different approaches to judicial power in the principal judgment and the concurring judgment is equally evident from the fact that the latter judgment accepts that the supervisory jurisdiction of the courts and their inhe rent powers allow them great latitude to examine executive decisions and omissions. In other words, the concurring judgment does not restrict judicial power to that prescribed in art 121(1) of the FC, as does the principal judgment.

[68] This is exemplified in the concurring judgment in relation to the purported exclusion of natural justice in s 59 of the Immigration Act. There is a strong defence of the supervisory jurisdiction of the courts, particularly in relation to the right to be heard in respect of any act or omission with respect to executive decisions or omissions.

A **[69]** In this context it is said that a citizen enjoys the right to be advised of, and told of the reasons for a particular executive decision or omission.

[70] Notwithstanding this the concurring judgment does go on to hold that ss 59 and 59A are both constitutionally valid.

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[71] The principal judgment by contrast maintains that Parliament is entirely at liberty to dispense with the right to be heard where it deems fit and it is not open to the courts to question this in any manner.

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[72] However, the point to be made in relation to the conflicting nature of the two judgments comprising the majority view is that the statements in the concurring judgment that state that the right to be heard is fundamental and cannot be removed, does not sit well with the principal judgment that maintains that Parliament is at liberty to remove the right to be heard when it deems it fit to do so.

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[73] As borne out by the passages cited from both judgments, the principal judgment expressly rejects the basic structure doctrine in its entirety maintaining that as an 'alien' doctrine it has no place nor application in constitutional adjudication relating to the FC. However, the concurring judgment implicitly accepts the application of the same, without expressly stating so, by its acceptance of the statements in *Indira Gandhi* on the definition of judicial power, as set out above.

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[74] The principal judgment maintains that the issue in *Maria Chin* in relation to the ouster clause was whether it contravened the provision of art 121(1) of the FC, which it concluded was not the case. In other words, the legal position taken is that a clause ousting the entirety of the jurisdiction and powers of judicial review of the court, save for compliance with provisions within the statute, does not contravene judicial power under the FC, because the entirety of such power is circumscribed by art 121(1) of the FC. And as such power is only as conferred by or under federal law, it is open to Parliament to legislate so.

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[75] However, the concurring judgment does not accept the legal proposition that judicial power is relegated to nor circumscribed entirely by art 121(1) of the FC. Neither is it accepted that the court is precluded from exercising its supervisory jurisdiction and powers which are not expressly stipulated in art 121(1). Further the concurring judgment accepts the existence of the inherent jurisdiction of the courts.

I

[76] These differing stances comprise fundamental differences that cannot be reconciled.

THE DIFFERENCES BETWEEN THE PRINCIPAL AND CONCURRING JUDGMENTS ARE IRRECONCILABLE

[77] As is evident from the foregoing and from the differing submissions put forward by the appellants and the respondents, the approach and substance of the principal and concurring judgments comprising the majority differ in substantive and fundamental aspects, in relation to the source and ambit of judicial power under the FC. This is of importance because it is essential that the repository of judicial power under the FC is clear beyond dispute.

[78] In summary, the principal judgment effectively stipulates that Parliament reigns supreme and that the courts are only empowered to act in accordance with the powers conferred by and under federal law. Whereas the concurring judgment accepts that judicial power extends beyond the limits prescribed on a literal reading of art 121(1) of the FC and extends to a supervisory power to challenge and correct contraventions of fundamental liberties under the FC.

[79] It also accepts the existence and application of the inherent powers of the court.

[80] If, as stated in the principal judgment, art 121(1) of the FC is the sole repository of judicial power, as a literal reading of the article might imply, then the judicial powers of the court are determined and dictated to by Parliament, making the country one that is governed by Parliamentary sovereignty.

[81] If, on the other hand, as accepted in the concurring judgment, judicial power extends beyond the narrow ambit of art 121(1) of the FC and includes art 4(1) of the FC (which contains a constitutionally endowed power to review legislation to ensure that it accords with the provisions of the FC as a whole), then the conclusion that must follow is that constitutional supremacy, rather than Parliamentary sovereignty, prevails in Malaysia.

[82] The principal and the concurring judgment display a clear lack of cohesion on this fundamental issue.

[83] This substantive anomaly in the two judgments comprising the majority judgment makes it difficult, with great respect, to reconcile and ascertain a clear ratio of the construction adopted in the entire judgment. The principal and concurring judgments give rise to much uncertainty as to the correct legal position in relation to the fundamental issue of judicial power under the FC. The net result is that it is difficult to ascertain with any degree of clarity the ratio decidendi of the majority decision in relation to the fundamental issue in *Maria Chin*, namely the source and ambit of judicial

power and consequentially the effect of ouster clauses.

[84] Further, the principal judgment expressly departs to some considerable extent from the recent trilogy of cases in *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo*, while the concurring judgment comprising a part of the majority judgment implicitly accepts the precedential value of those judgments. The trilogy of cases expressly accepts the basic structure doctrine to support the fact that art 121(1) of the FC as it present reads does not abrogate nor reduce judicial power to that conferred by or under federal law. As the concurring judgment accepts and relies on the reasoning in both *Semenyih Jaya* and *Indira Gandhi*, there is at the very least a tacit acceptance of this legal doctrine.

[85] This gives rise to a conflict between these two decisions which are stated to be in agreement with each other. What is clear is that with such differing fundamental concepts a clear ratio decidendi from the majority decision is effectively precluded. The principal and concurring judgments are, to that extent, irreconcilable.

WHAT IS THE POSITION WHEN NO CLEAR RATIO DECIDENDI IS DISCERNIBLE FROM THE MAJORITY JUDGMENT IN MARIA CHIN?

[86] In view of this difficulty what is the position to be adopted in law? As stated in the decision of the Supreme Court of India in *BGS SGS Soma JV v NHPC Ltd* [2020] 3 MLJ 336; LNIND 2019 SC 995 by Justice RF Nariman:

> ... a judgment must be read as a whole, so that conflicting parts may be harmonised to reveal the true ratio of the judgment. However, if this is not possible, and it is found that the internal conflicts within the judgment cannot be resolved, then the first endeavour that must be made is to see whether a ratio decidendi can be culled out without the conflicting portion. If not, then as held by Lord Denning in *Harper and others v National Coal Board* [1974] 2 All ER 441, 'the binding nature of the precedent on the point on which there is a conflict in a judgment comes under a cloud'.

[87] Turning then to the English case of *Harper and others v National Coal Board* [1974] 2 All ER 441, the relevance of the case is that Lord Denning had to deal with a judgment of the House of Lords in *Central Asbestos Co Ltd v Dodd* [1972] 2 All ER 1135 ('Dodd') which related to ascertaining when limitation accrued to bar what were asbestos related claims by workmen. Lord Denning described the speeches the Law Lords involved in the decision as showing 'a perplexing difference of view'.

[88] In that case the decision was a majority of three to two. Two of the majority accepted the view of the Court of Appeal that time did not run against

a claimant until he knew he had a cause of action, and that therefore the claim was not barred. The two in the minority disagreed, maintaining that limitation had set in. And the fifth judge held that limitation did not set in but for a completely different reason. The question that arose was the precedential value of the decision of the House of Lords.

[89] Lord Denning dealt with the issue as follows:

> ... How then do we stand on the law? ... One thing is clear. We can only accept a line of reasoning which supports the actual decision of the House of Lords. By no possibility can we accept any reasoning which would show the decision itself to be wrong. The second proposition is that, if we can discover the reasoning on which the majority based their decision, then we should accept that as binding on us. The third proposition is that, if we can disco ver the reasoning on which the minority base their decision, we should reject it. It must be wrong because it led them to the wrong result. The fourth proposition is that if we cannot discover the reasoning on which the majority based their decision we are not bound by it. We are free to adopt any reasoning which appears to us to be correct, so long as it supports the actual decision of the House.
>
> In support of those propositions, I would refer to the speeches of Viscount Dunedin in *Great Western Railway Co v Mostyn Owners* [1928] AC 57 and Viscount Simonds in *Scruttons Ltd v Midland Silicones Ltd* ...

[90] Lord Denning went on to apply these propositions of the law to the actual precedent they were dealing with. He stressed that the reasoning of the majority should be applied if it is discoverable. But it was not discoverable. The three were divided. Two of the majority took one view of the law. And the third took another. In such an instance Lord Denning held that it could not be said that the two in the majority were correct because their view of the law was in conflict with the reasoning of the other three. And neither was the view of the third judge in the majority correct because it led to the other t wo deciding otherwise and making a wrong conclusion. The net result was that there was no discernible ratio among the majority of the House of Lords. As such they were at liberty to adopt the reasoning which appeared to them to be correct. And the court went on to accept a line of reasoning different from that of the majority of the House of Lords in *Dodd*.

[91] In *Maria Chin*, the ultimate decision of the court was unanimous, namely to allow her appeal. It was the legal reasoning on the fundamental issue of judicial power that differed throughout the four judgments of this court. Put another way, the judges in the seven-man coram arrived at the same end-conclusion through fundamentally differing bases.

[92] The minority decision comprising two different judgments, essentially relied on and extrapolated from, the trilogy of decisions in *Semenyih Jaya*,

Indira Gandhi and *Alma Nudo*, as well as the basis of judicial power being vested in arts 4(1) and 121(1) of the FC read together. To that end, the situation here differs slightly from that in *Harper*'s. As the end result is the same, it cannot be said that the minority decision is premised on wrong legal reasoning.

[93] However, given the difference in the fundamental legal reasoning of the two judgments in the majority decision, resulting in an inability to cull a clear ratio decidendi, it follows that the solution outlined in the English Court of Appeal's decision in *Harper*'s and followed in the Indian Supreme Court decision of *BGS SGS Soma* is entirely tenable.

[94] When that reasoning is applied it follows that this court is not bound by the legal reasoning of the majority in *Maria Chin*. This court therefore remains at liberty to adopt the reasoning it deems to be most coherent in dealing with the issue at hand, namely the constitutional validity of ouster clauses.

THE CONSTITUTIONAL VALIDITY OF S 15B OF THE POCA

The submissions of parties on this issue

[95] The appellant submits on this issue, in summary, that s 15B of the POCA is unconstitutional as it violates arts 4(1), 8(1) and 121 of the FC. Consequently, it further intrudes upon the judicial power to grant relief in accordance with para 1 of the Schedule to the Courts of Judicature Act 1964. The appellants rely on the basic structure doctrine to support their position, relying, inter alia, on *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333, as well as *Indira Gandhi*, *Alma Nudo*, *Letitia Bosman v Public Prosecutor and other appeals (No 1)* [2020] 5 MLJ 277, *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112 and *Semenyih Jaya*.

[96] These cases are also cited to support the contention that the doctrine of the separation of powers is entrenched in the FC.

[97] The respondents on the other hand point to art 149 of the FC and maintain that art 5 of the FC is excluded by the former. As art 149 'excludes' arts 5, 9, 10 and 13 this court ought not to rely on the doctrine of basic structure. In support of this contention, they rely on *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70; [1979] 1 LNS 67 ('Phang Chin Hock') as set out in *Goh Leong Yong v ASP Khairul Fairoz bin Rodzuan & Ors* [2021] 5 MLJ 474; [2021] 8 CLJ 331 ('Goh'), primarily to make the point that the role and duty of the courts is to interpret the law as provided by the statute. *Goh* goes on to stipulate that the powers of the courts are derived from federal law as prescribed under art 121 only, much like the principal judgment in *Maria*

Chin. *Goh* goes on to support this position by stating at para 165:

> ... The powers of the courts are derived from federal law as prescribed under art 121. If that is not so, then where do the court s derive its powers? It certainly is not from the Basic Structure Doctrine. As such the court's role is to interpret laws enacted by Parliament ...

[98] As *Phang Chin Hock* deals primarily with the issue of whether art 4(1) applies to ordinary law only and not to constitutional amendments, that will be dealt with later on in the judgment in the analysis relating to the extent and purport of art 4(1).

[99] The respondents also rely on *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 ('Loh Kooi Choon') to state that it is not for the courts to embark on a consideration of whether legislation enacted pursuant to art 149, ie preventive detention legislation is harsh and unjust or otherwise, as this is a matter of policy for Parliament. The duty of the court it was reiterated, was simply to interpret the statute in accordance with settled rules of construction. As such it was submitted that the proper position for the court to take is to interpret POCA within the context of art 149 that 'excludes' arts 5, 9, 10 and 13 of the FC and not to reject 'it', presumably s 15B of the POCA by application of the doctrine of the basic structure.

[100] The appellants respond to this by refuting the accuracy of *Goh* by reference to the case of *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases* [2021] 3 MLJ 759 ('Zaidi bin Kanapiah'). They maintain that the reliance in *Goh* on the rejection of the basic structure doctrine in *Zaidi bin Kanapiah* as being flawed as the majority in *Zaidi bin Kanapiah* accepted that there were basic features to the FC, art 4(1) safeguarded the supremacy of the FC through the Judiciary; endorsed the existence of the doctrine of the separation of powers in the FC and that judicial power extended to the right of judicial review as specified in the second limb of art 4(1) of the FC, and finally that it was not incorrect to refer to foreign doctrines or jurisprudence in interpreting the FC where it was relevant. In short, the appellants submit that the majority in *Zaidi bin Kanapiah* accepted that judicial power was not restricted to art 121(1) of the FC. The minority in *Zaidi bin Kanapiah* dealt with judicial power, essentially maintaining that it was restricted to that set out in art 121(1) of the FC, and rejecting the basic structure doctrine.

[101] This comprises a summary of the substance of the submissions of parties on the issue of the constitutional validity of s 15B of the POCA.

[102] It is clear from the above that there is a conflict between the source and scope of judicial power in *Zaidi bin Kanapiah* and *Goh*. This conflict will be considered in the course of the analysis on the constitutional validity of s 15B

of the POCA.

Analysis on the constitutional validity of s 15b of the POCA

[103] Section 15B of the POCA provides as follows:

> 15B(1) There shall be *no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Board* in the exercise of its discretionary power in accordance with this Act, *except in regard to any question on compliance with any procedural requirement in this Act* governing such act or decision.
>
> (2) In this Act, 'judicial review' includes proceedings instituted by way of:
>
> (a) an application for any of the prerogative orders of mandamus, prohibition and certiorari;
>
> (b) an application for a declaration or an injunction;
>
> (ba) a writ of habeas corpus; and
>
> (c) any other suit, action or other legal proceedings relating to or arising out of any act done or decision made by the Board in accordance with this Act. (Emphasis added.)

[104] As I have stated elsewhere, s 15B of the POCA is a clause that seeks to oust the jurisdiction of the court in relation to any form of judicial scrutiny of preventive detention proceedings in relation to any act made by the Prevention of Crime Board ('Board') constituted under POCA, save only for a failure of compliance with any procedural requirement within POCA itself.

[105] The degree of judicial scrutiny, as is evident from the words utilised in the statutory provision itself, is extremely narrow. It only allows for intervention or consideration by the courts in relation to compliance with a specific procedural issue within POCA itself. Such a narrow definition does not extend to judicial scrutiny of any procedural irregularity or due process in the general sense, but is limited to the procedural aspects specified in POCA itself.

[106] The rigidity of the ouster clause is borne out by the fact that, on a literal reading, it even purports to exclude habeas corpus, notwithstanding the expressly provided constitutional safeguard in art 5(2) of the FC.

[107] It is perhaps easier to comprehend the purported magnitude and reach of this clause by looking at what the courts are proscribed from doing in relation to an act or decision of the Board, which is an inferior statutory tribunal. It purports to remove the court's ability to scrutinise the legality of a determination made by the Board to detain an individual under POCA. In

short, it purports to strip the courts of their constitutionally entrenched supervisory judicial function in both arts 4 and 5(2) of the FC. A

[108] Article 5(2) of the FC will be considered first. The right of constitutional review of detention under art 5(2) of the FC, it would appear at first blush, is not permitted as that requires the court to ascertain the legality of the decision to detain, and is not limited to a question of compliance with the procedural requirements set out in POCA. Neither would any scrutiny of the basis for the detention under POCA be sustainable either, as that would not amount to a question of compliance with a procedural requirement within POCA. B C

The legality of detention under POCA and art 5(2) of the FC

[109] The issue of the relevance and applicability of art 5(2) of the FC has already been dealt with at length at the outset. It has been pointed out that while legislation enacted under art 149 of the FC is valid notwithstanding its inconsistency with arts 5, 9, 10 and 13, this is not equivalent to excluding or suspending the application of art 5(2) of the FC in relation to preventive detention legislation. The remedy of release or habeas corpus remains a means of procuring redress for unlawful detention, including preventive detention under the FC, because art 5(2) of the FC has not been expressly suspended in relation to preventive detention legislation under art 149 of the FC. D E

Issues of compliance under POCA — Sole basis for review F

[110] As enacted, s 15B of the POCA only allows for issues of compliance with the Act itself to be amenable to review. It should be noted that the use of the specific saving provision in POCA does not extend generally to 'procedural irregularities' as is often somewhat loosely termed and understood. The latter includes within its purview a larger range of irregularities relating to, for example, general principles of natural justice etc. G

[111] Therefore, the statement often made, that judicial review is available to review 'any procedural irregularities' is not entirely correct, because even a 'procedural irregularity' is restricted to issues of compliance within the Act itself, ie POCA itself. H

Is s 15B of the POCA constitutionally valid? What is the relevant basis for ascertaining the validity of s 15B under the FC? I

[112] Given the foregoing, the primary issue that falls for consideration in relation to this issue is the constitutionality of s 15B of the POCA. How is the constitutionality of a statutory provision tested? It is trite that this is done

A under art 4(1) of the FC. If the enacted provision is said to be inconsistent with s ome provision in the FC, then the Judiciary, undertaking its role of constitutional judicial review, reviews the enacted to law to ascertain whether it is indeed inconsistent with one or more of the provisions of the FC. *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112 and *Semenyih Jaya*.

B

Article 4(1) of the FC:

> 4(1) Supreme Law of the Federation
>
> This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency be void.

C

[113] This article which is akin to the essence or *elan vité* of the Constitution. In its relatively short content, it carries several powerful normative elements which prescribe the manner in which the power of governance is distributed within the nation state.

D

CONSTITUTIONAL SUPREMACY

E

[114] By stipulating that the Constitution is the supreme law of the federation:

(a) the FC prescribes constitutional supremacy rather than Parliamentary sovereignty; and

F

(b) the supremacy of the Constitution is guaranteed by the rest of the article which goes on to provide that inconsistency with the FC renders any enacted law void.

G

[115] The article makes it clear beyond dispute that the nation operates under the doctrine of constitutional supremacy rather than Parliamentary sovereignty.

H

CONSTITUTIONAL JUDICIAL REVIEW

[116] How is constitutional supremacy guaranteed? While the normative may be prescribed, it needs guarantees and execution. Clearly the FC is not self-executing.

I

[117] The only manner in which any enacted law which is inconsistent with the FC can be held to be void operationally, is through the mechanism of judicial review. And this role or function of constitutional judicial review falls

on the Judiciary. The Judiciary undertakes the role of safeguarding the supremacy of the FC by declaring any such inconsistent law, void. It is, in effect, the guardian of the FC.

[118] It follows that constitutional judicial review is expressly encompassed in art 4(1) of the FC.

THE DOCTRINE OF THE SEPARATION OF POWERS

[119] However, art 4(1) of the FC goes considerably further when construed with care. By providing for the ability to render enacted law void if inconsistent with the FC, art 4(1) of the FC also clearly houses the doctrine of the separation of powers. It ensures that where the Legislature enacts laws which are outside the purview of the FC, such laws are void. This effectively provides a check and balance mechanism in relation to the division of power between the arms of government. Neither the Legislature nor the Executive should enact or execute laws that are inconsistent with the FC. In this context it is not purely an issue of the division of powers, but rather undertaking the highest responsibility for maintaining the state and social order. This separation is maintained by the mechanism of constitutional judicial review. Judicial review lies at the heart of the FC as it enables or facilitates the operation of the doctrines of the separation of powers as well as ensuring that the basic features and thus the fundamental identity of the FC is retained.

BASIC STRUCTURE OF THE FC

[120] And finally, by ensuring that all laws comply with the FC, art 4(1) of the FC also recognises, embraces and encompasses the concept of the basic structure or fundamental legal structure of the Federal Constitution. This is because the fundamental blueprint of the Constitution is safeguarded, as laws inconsistent with it are void.

[121] The concept of the basic structure has been described as alien to the nation as it is not expressly provided for in the written letter of the FC. Very few constitutional concepts are indeed spelt out literally in a constitution. Rather, it is the norm that these constitutional concepts or doctrines underpin the constitution although they may not be expressly set out as the basis for a particular constitutional provision.

[122] Why it might be asked is there a need for such a doctrine? It might be argued that taking a rigid approach might well hamper constitutional amendment and evolution.

[123] The answer is that the supremacy and priority of the FC sets boundaries to constitutional amendment. The FC contains the basic or fundamental features that are essential for forming the state and society. It is these fundamental f eatures that should therefore give structure and direction to the enactment of laws and for the administration of those laws (see *Constitutionalism — Past, Present and Future* by Dieter Grimm, Oxford Constitutional Theory, Chapter 2 at p 141). The basic features of the FC, such as art 3 of the FC relating to religion, the fundamental liberties in Part II of the FC, citizenship of the state, the role of the YDPA and the Malay rulers as the heads of religion, the division of power between the Executive, Legislature and the Judiciary with the YDPA at the head, all comprise the basis on which the state and social order was prescribed, which are central and fundamental to the peace and stability of the nation.

[124] The content of the FC therefore ensures permanence, validity and durability to the basis of governance in the state.

[125] This is not to say that constitutional amendment is forestalled. On the contrary, constitutional amendment may well be required for desirable development and for constitutional improvement. However, this cannot be extended to fundamental provisions or the essential features of the constitution, as there would then result a new constitution rather than constitutional improvement. Hence the provisions of art 4(1) which preclude inconsistency with the FC in its entirety.

The basic structure doctrine

[126] The recent differing approaches in the decisions of this court in *Maria Chin* and as well as *Zaidi bin Kanapiah* and *Goh*, have centred on the source and ambit of judicial power within the FC. This conflict arises as a consequence of the 1988 amendment to art 121(1) of the FC pursuant to the Constitution (Amendment) Act 1988 (A704/1988). In summary, the said constitutional amendment act was seen to have somehow abrogated judicial power as a result of which the Judiciary was seen to have been subordinated to Parliament. The pinnacle of this line of construction of the amendment act is reflected in the majority decision in *Kok Wah Kuan* which held, by a majority, that the Judiciary may only act in accordance with, and under federal law.

[127] However, the more recent decisions of this court in *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo* effectively reversed the line of thinking and construction in *Kok Wah Kuan*. This was done in part by introducing the doctrine of the basic structure of the FC.

[128] In the recent decisions of this court in *Maria Chin*, *Rovin Joty* and *Goh*

there was a resurgence towards the line of reasoning and construction adopted in *Kok Wah Kuan*, essentially rejecting the basic structure doctrine in the course of ascertaining the constitutional validity of ouster clauses, which are prevalent in many pieces of legislation.

[129] Given this conflict it is both prudent and necessary to analyse the legal theory and reasoning underlying the FC to definitively ascertain and resolve this issue of the source and ambit of judicial power in this nation which practices constitutional supremacy.

Is judicial power limited to or by art 121(1) of the FC as amended by Constitution (Amendment) Act 1988 (Act A704/1988)?

[130] Article 121(1) of the FC presently reads as follows:

> 121 Judicial Power of the Federation
>
> (1) There shall be two High Courts of co-ordinate jurisdiction and status namely —
>
> ...
>
> And such inferior courts as may be provided by federal law and the High Courts and inferior courts shall have such jurisdi ction and powers as may be conferred by or under federal law.

[131] Prior to the amendment, art 121(1) read as follows:

> 121 Judicial Power of the Federation
>
> (1) Subject to Clause (2) the judicial power of the Federation shall be vested in two High Courts of co-ordinate jurisdiction and status, namely —
>
> ...
>
> And in such inferior courts as may be provided by federal law.

[132] As history tells us, the amendment was brought about soon after the decision of this court in *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311 where the issue was whether s 418A of the Criminal Procedure Code encroached on judicial power. The court held that it did and that therefore the relevant section was void for inconsistency with the FC under art 4(1) of the FC.

[133] As a consequence of the amendment as is apparent from above, the words 'Subject to Clause (2), the judicial power of the Federation shall be vested in ...'.

[134] The *Hansard* reports the purpose for the removal of the vesting

provision in the two High Courts as follows:

> ... Pada masa ini, dengan adanya peruntukan tentang meletakhak kuasa kehakiman Persekutuan itu, batasan antara bidang kehakiman dan bidang eksekutif atau perundangan adalah samar-samar. Dengan pindaan ini, Kerajaan berharap akan dapat menggariskan batasan itu dengan jelasnya. Ini adalah penting supaya pihak eksekutif, perundangan dan kehakiman dapat menunaikan tanggungjawab masing-masing tanpa menggangu atau diganggu oleh pihak yang lain. Rang Undang-undang ini bukan bertujuan untk mengambil kuasa daripada Hakim-hakim ataupun daripada Mahkamah-mahkamah. Rang Undang-undang ini Cuma bertujuan untuk menentukan bahawa pihak Dewan ini berhak membuat undang-undang dan pihak Hakim berhak untuk menghukumkan sesuatu berasaskan kepada undang-undang. Rang Undang-undang ini tidak memberi kuasa kehakiman kepada kita. Hanya yang dia menentukan ialah Hakim-hakim dalam menjatuhkan hukum atau membicara hendaklah berpandu kepada undang-undang yang dibuat oleh Dewan ini yang dianggap sebagai Federal Law. Itu sahaja yang kita buat, tidak lebih daripada itu ...

English translation:

> ... With the provision vesting the judicial power of the Federation, the boundary between the judiciary and the executive or the legislature is vague. With this amendment, the Government hopes to demarcate that boundary clearly. It is essential so that the executive, legislatureand judiciary can perform their responsibilities without disturbing or being disturbed by the others ...
>
> This Bill is not intended to take power from the Judiciary or from the Courts. It is only to ensure that we in this House can make laws, and the Judges can determine matters in accordance with the law ... this Bill does not give judicial power to us. It only ensures that the Judges in sentencing and judging, must be guided by the law made by this House, which is regarded as Federal Law. That is all we are doing, nothing more than that.

[135] The sequel to this amendment was naturally the question of whether the Judiciary had been subordinated to Parliament, and more importantly whether with this single amendment the very basis of the FC had been altered from one of constitutional supremacy to one of Parliamentary sovereignty.

[136] This question remained moot until the majority decision of this court in *Kok Wah Kuan*. Abdul Hamid Mohamed FCJ (later Chief Justice) held variously as follows in relation to the amendment to art 121(1):

> [11] After the amendment, there is no longer a specific provision declaring that the judicial power of the Federation shall be vested in the two High Courts ... If we want to know the jurisdiction and powers of the two High Courts, we will have to look at the federal law. If we want to call those powers 'judicial powers' we are perfectly entitled to. *But, to what extent such 'judicial powers' are vested in the two High Courts depend on what federal law provides, not on the interpretation of the term 'judicial power' as prior to the amendment. That is the difference and that is the effect of the*

amendment. Thus, to say that the amendment has no effect does not make sense. There must be. The only question is to what extent?

[21] Now that the pre-amendment words are no longer there, they simply cannot be used to determine the validity of a provision of a statute. *The extent of the powers of the courts depends on what is provided in the Constitution. In the case of the two High Courts, they 'shall have such jurisdiction and powers as may be conferred by or under federal law'.*

[22] So, *even if we say that judicial power still vests in the courts in law, the nature and extent of the power depends on what the Constitution provides, not what some political thinkers think 'judicial power' is*. Federal law provides that the sentence of death shall not be pronounced or recorded against a person who was a child at the time of the commission of the offence. That is the limit of judicial power of the court imposed by law. (Emphasis added.)

[137] The majority decision held that it was not apparent which provision of the FC, s 97 was inconsistent with. The Court of Appeal, speaking through Gopal Sri Ram JCA (later FCJ) held that the said s 97 violated the doctrine of the separation of powers which was a part of the FC. The majority decision then briefly dealt with the doctrine before further stipulating that:

[17] In other words we have our own model. Our Constitution does have the features of the separation of powers and at the same t ime, it contains features which do not strictly comply with the doctrine. To what extent the doctrine applies depends on the provisions of the Constitution. *A provision of the Constitution cannot be struck out on the ground that it contravenes the doctrine. Similarly, no provision of the law may be struck out as unconstitutional if it is not inconsistent with the Constitution, even though it may be inconsistent with the doctrine. The doctrine is not a provision of the Malaysian Constitution even though no doubt, it had influenced the framers of the Malaysian Constitution, just like democracy.* The Constitution provides for elections, which is a democratic process. That does not make democracy a provision of the Constitution in that where any law is undemocratic it is inconsistent with the Constitution and therefore void.

[18] So, in determining the constitutionality or otherwise of a statute under our Constitution by the court of law, *it is now the provision of our Constitution that matters, not a political theory by some thinkers.* As Raja Azlan Shah FJ (as His Royal Highness then was) quoting Franfurther J said in *Loh Kooi Choon*: 'The ultimate touchstone of constitutionality is the Constitution itself and not any general principle outside it.

[138] In so holding, this court in 2007 construed the 1988 amendment in A704/1988 as having effectively eroded judicial power to the extent that it was circumscribed solely to such power prescribed by or under federal law. It also held that no statute nor statutory provision could be held to be inconsistent with the FC and consequently be struck down, unless it was inconsistent with a particular provision of the FC, rather than any doctrine such as the separation of powers.

[139] It is notable that a fundamentally similar approach was adopted in the principal majority decision in *Maria Chin* (as set out above), thereby resurrecting the ratio decidendi of the majority decision in *Kok Wah Kuan*, which was effectively overruled in subsequent decisions of this court in the trilogy of cases relating to judicial power in *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo*.

[140] This attempt to set the law back to the construction adopted in *Kok Wah Kuan* is borne out by the legal reasoning in the *principal judgment of the majority decision*, namely that the ouster clause in s 59A of the Immigration Act cannot be struck down for being unconstitutional because it did not contravene any particular provision of the FC, but rather the doctrine of the separation of powers, which was insufficient to render it unconstitutional.

[141] The reasoning is identical to that of the majority in *Kok Wah Kuan*, in that it was further held that as s 59A was enacted 'pursuant to' federal law as provided under art 121(1) of the FC, it was perfectly in order to prohibit and/or circumscribe the jurisdiction of the courts in such manner as Parliament saw fit. This was because there was express provision for this in art 121(1) of the FC by the use of the words 'conferred by or under federal law'.

[142] The resurrection of this form of interpretation of the jurisdiction and powers of the High Court having been eroded substantively by the constitutional amendment Act, A704/1988 is, with respect, unjustified in light of the clear development of the law relating to judicial power, subsequent to the decision of the majority in *Kok Wah Kuan*.

[143] It is an unwarranted departure from the renowned trilogy of decisions in *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo*, not to mention *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333, that followed on from *Kok Wah Kuan*. The clear departure in the principal judgment of the majority in *Maria Chin* amounted, with respect, to a retrograde withdrawal from the evolution of the construction of the amendment to art 121(1) of the FC in relation to judicial power. It is therefore important to compare and consider the legal coherence and rationale in these two lines of cases to ascertain the true intent and purport of judicial power under the FC.

[144] Prior to considering the evolution of the law from *Kok Wah Kuan*, it would be remiss not to mention the strong dissenting judgment of Richard Malanjum CJ (Sabah and Sarawak) (later Chief Justice) in that case:

> [37] At any rate I am unable to accede to the proposition that with the amendment of art 121(1) of the Federal Constitution (the amendment) the courts in Malaysia can only function in accordance with what have been assigned to them by federal laws. Accepting such proposition is contrary to the democratic system of

government wherein the courts form the third branch of the government and they function to ensure that there is 'check and balance' in the system including the crucial duty to dispense justice according to law for those who come before them.

[38] The amendment ... should by no means be read to mean that the doctrines of separation of powers and independence of the Judiciary are now no more the basic features of our Federal Constitution. I do not think that as a result of the amendment our courts have now become servile agents of a federal Act of Parliament and that the courts are now only to perform mechanically any command or bidding of a federal law.

[145] Equally Heliliah FCJ in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2011] 1 MLJ 158 did not accept that A704/1988 brought about any structural or functional changes to the Judiciary and that it remained intact.

THE TRILOGY OF CASES

[146] In *Semenyih Jaya*, the majority decision in *Kok Wah Kuan* was rejected and overruled by this court. For the purposes of tracing the chronology of the evolution of the law relating to judicial power under the FC, it suffices to state that this court held that s 40D of the Land Acquisition Act 2010 was a judicial power and that as the power was effectively vested in two lay assessors, it breached the doctrine of the separation of powers. As such s 40D was unconstitutional. In arriving at this result, *the decision of the Court of Appeal in Kok Wah Kuan was affirmed as being the correct decision, rather than the construction adopted in the majority decision of this court. Most pertinently it was affirmed that the judicial power of the Federation remained in the two High Courts, notwithstanding A704/1988.*

[147] In explaining its rationale this court held, inter alia:

(a) at para 74 that A704/1988 effectively undermined the judicial power of the Judiciary and impinges on the doctrine of the separation of powers and the independence of the Judiciary;

(b) at para 75 the court held that any removal of judicial power from the inherent jurisdiction of the judiciary would render it subordinate to Parliament. Any such attempt to do so 'was manifestly inconsistent with the supremacy of the FC enshrined in art 4(1) of the FC'. Reliance was placed on *Ah Thian* where the doctrine of Parliamentary sovereignty or supremacy was firmly rejected as Malaysia has a written constitution which specified the limits within which Parliament could make laws;

(c) at para 79, referring to the judgment of Gopal Sri Ram FCJ in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333, the Federal Court accepted the basic structure doctrine as applying in this

jurisdiction, which protected the basic features of the FC; and

(d) the amendment power of Parliament in art 159 of the FC is subject to the basic structure doctrine.

[148] The decision in *Semenyih* was fortified and endorsed in the subsequent decisions of this court in *Indira Gandhi* and *Alma Nudo*. With this trilogy of decisions, it was made clear beyond doubt that *judicial power is vested exclusively in the High Courts under art 121(1) of the FC. The doctrines of the separation of powers and judicial independence were reasserted as comprising a part of the basic structure of the FC. It should be stated that the dissenting judgment in Kok Wah Kuan was adopted as reflecting the correct position in law.*

[149] Having considered this chronology of case law and the evolution of judicial analysis to give legal coherence to the structure and function of the Judiciary within the FC, it is simply untenable to revert to a mode of construction which is wholly incompatible with the FC. It must be borne in mind that the FC is a constitution based on the Westminster model and accordingly vests judicial power in the Judiciary. Most significantly, the Judiciary is not subordinate to Parliament in such a constitution.

[150] It is evident that vide the trilogy of cases, this court advanced and overruled the legal reasoning in *Kok Wah Kuan* definitively. It rejected any contention of judicial powers having been removed, and re-asserted and reinstated the correct position in law, namely that judicial power was not removed by the constitutional Amendment Act A704/1988.

[151] Given the strong and coherent legal reasoning in those cases, particularly *Semenyih Jaya*, the principal judgment in the majority decision in *Maria Chin*, while seemingly only distinguishing *Semenyih Jaya* and *Indira Gandhi*, appears to corrode the evolution and progress of the law in relation to scope of judicial power, back to the state of the law prescribed by the majority in *Kok Wah Kuan*.

[152] This turn in legal reasoning, restricting the source and scope of judicial power, as well as restricting the effect of art 4(1) of the FC, became more apparent when the courts dealt with ouster clauses in relation to preventive detention cases, for example s 15B of the POCA.

The cases of: (a) Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases [2021] 3 MLJ 759 ('Zaidi bin Kanapiah'); and (b) Goh Leong Yong v ASP Khairul Fairoz bin Rodzuan & Ors [2021] 5 MLJ 474; [2021] 8 CLJ 331 ('Goh')

[153] Judicial power under the FC was brought further into focus, this time in relation to preventive detention legislation in these two cases which need consideration in relation to judicial power.

Zaidi bin Kanapiah

[154] In *Zaidi bin Kanapiah* a majority of three out of five judges held that s 4 of the POCA was valid and constitutional while the dissenting minority of two judges held otherwise, namely that s 4 of the POCA was unconstitutional. However, it is not so much the final result of constitutionality as much as the legal rationale and the legal premise of judicial power that is relevant to the issue here, namely judicial power under the FC. By way of reiteration, this in turn is a fundamental issue that will determine the constitutional validity of ouster clauses.

[155] However, it should be noted that while the majority determined that s 4 of the POCA is constitutional, the determination on the issue of judicial power is less clear.

[156] In point of fact, the majority in *Zaidi bin Kanapiah* agreed that judicial power was not abrogated pursuant to the constitutional Amendment Act A704/1988. Despite citing *Kok Wah Kuan*, the said case was applied for the proposition that laws should be interpreted based on the existing provisions of art 121(1) of the FC, rather than art 121 as it read pre-amendment. However, the majority went on to stipulate at para 311 that:

> ... *The absence of the words 'judicial powers' under art 121 of the FC does not in any manner or form emasculate the powers of the courts. Au contraire, the jurisdiction and powers of the Judiciary remain intact with the Judiciary.* Until and unless cl (1) art 121 of the FC is amended, the ju risdiction and powers of the courts are as conferred by Federal law. Thus, it necessarily follows the jurisdiction and powers of the courts under POCA do not violate the amended art 121 of the FC. (Emphasis added.)

[157] It is therefore clearly accepted by the majority in *Zaidi bin Kanapiah* that judicial powers were never abrogated by the removal of the words 'judicial powers' and that A704/1988 did not have the effect of reducing the court's judicial powers.

[158] This was amplified further in relation to constitutional amendments by Justice Vernon Ong FCJ, who stated at the outset of his judgment that while he concurred that s 4 of the POCA is not unconstitutional, his reasons for arriving at the conclusion differed from the majority. In this context, His Lordship held at para 162 that he agreed with the minority view, inter alia, that:

A ... (a) the power of constitutional review is inherent in the courts by constitutional design. The drafters of the FC had in mind certain basic principles which ought to form the bedrock of this country and that under art 159(1), Parliament may amend certain provisions of it without amending the central tenets of the FC. This is a safeguard as couched in the wide language of the f irst limb of art 4(1) to cast away
B any attempt to cause the FC to implode on itself by abuse of the legislative process; ...

[159] In other words, Justice Vernon Ong FCJ accepted that art 159 of the FC cannot amend, vary or alter the fundamental or basic features of the FC by
C reason of art 4(1) of the FC. To that extent the basic structure doctrine as enshrined in art 4(1) of the FC was given full recognition.

[160] When read together with the judgment of the Chief Justice Tengku Maimun Tuan Mat and that of Rhodzariah Bujang FCJ it is evident that the
D actual majority in *Zaidi bin Kanapiah* is that:

(a) all the five judges agreed that the judicial powers of the courts were not abrogated by A704/1988; and

E (b) by a majority of three to two, the fundamental features or structure of the FC cannot be altered, varied or changed by a constitutional amendment vide art 159 by reason of art 4(1) of the FC, which serves to strike down any law which is inconsistent with the FC.

F **[161]** In this context, the other two judges held that any constitutional amendments could be effected vide art 159 of the FC even if they affected fundamental features of the FC. In so determining, the rationale was that the word 'law' in art 4(1) of the FC only makes reference to 'ordinary law' as opposed to 'constitutional amendment law'. This conclusion was premised on
G the judgments in Loh Kooi Choon (per Raja Azlan FCJ) and *Phang Chin Hock* (per Suffian LP). In effect, the concept of the basic structure doctrine was rejected. So too was the proposition that art 4(1) of the FC encompasses the said doctrine by its very terms.

H **[162]** The judgment of the Chief Justice Tengku Maimun Tuan Mat in the context of judicial power and constitutional amendments, reasoned that:

(a) A704/1988 did not abrogate judicial powers nor subordinate the Judiciary to Parliament;

I (b) the main reason for such a construction was the reasoning adopted in the majority decision in *Kok Wah Kuan* (as discussed earlier);

(c) as a consequence, numerous arguments have been taken up to maintain that A704/1988 is unconstitutional;

(d) the cases of *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo* affirmed the position that A704/1988 did not have such a subordinating effect on the Judiciary and judicial powers;

(e) in *Semenyih Jaya* and *Indira Gandhi* the doctrine of the basic structure of the FC which cannot be removed was adopted;

(f) the primary reason for rejecting the basic structure doctrine in this jurisdiction is set out in the judgments of Raja Azlan Shah In *Loh Kooi Choon* and Suffian LP in *Phang Chin Hock*. And this centres on the construction to be afforded to art 4(1) of the FC when considered with the power of constitutional amendment contained in art 159 of the FC. There the position taken was that a distinction had to be drawn between the use of the words 'federal law' in art 159 and the word 'law' utilised in art 4(1). From this 'difference' it was extrapolated that art 4(1) was only applicable to 'ordinary law' rather than 'constitutional amendments' which were effected by federal law; and

(g) the Chief Justice did not accept this distinction maintaining that law being the broader term necessarily encompassed federal law. Accordingly constitutional amendments which violated the FC could not be effected. That was the purport of art 4(1) of the FC.

Goh

[163] In relation to judicial power, the majority in *Goh*:

(a) disagreed with all the judges in *Zaidi bin Kanapiah* on the effect of A704/1988. At paras 73–74 it was held that art 121(1) had to be read as amended. It was reiterated (as was the case in *Maria Chin*) that the powers and jurisdiction of the Courts which are 'creatures of statute', are derived from federal law (art 121(1) of the FC). This has the effect of subordinating the Judiciary to Parliament, as was held in *Kok Wah Kuan*;

(b) by virtue of art 74(1) of the FC, Parliament was accorded the power to make laws with respect to all matters enumerated in the Federal List which included the jurisdiction and powers of all such courts. The FC has conferred on Parliament the power to legislate on the jurisdiction and powers of the courts, and in this context art 121(1) of the FC stipulates where the powers of the courts are derived from;

(c) the basic structure doctrine was rejected; and

(d) with respect to constitutional amendments vis a vis art 159 of the FC, the majority accepted the definition of 'law' as stipulated in *Phang Chin Hock* and *Loh Kooi Choon*.

[164] What may be gleaned from the cases of *Zaidi bin Kanapiah*, *Goh* and

Maria Chin, as well as the several judgments set forth there, in relation to ouster clauses, is that there is a divergence in views in relation to:

(a) the source and scope of judicial power under the FC; and

(b) whether the FC can be amended by Parliament vide federal law without restraint under art 159 of the FC, or whether such constitutional amendments are subject to art 4(1) of the FC?

The basic structure doctrine and art 4(1) of the FC

[165] At the core of this divergence in views lies the doctrine of the basic structure, as contained in art 4(1) of the FC. The origins and compass of this doctrine are, with respect, fully and comprehensively canvassed in the majority decision in *Zaidi bin Kanapiah*, although the application of the doctrine is rejected for purposes of application in this jurisdiction. Neither is it accepted that art 4(1) of the FC encompasses the doctrine.

[166] The definition of the basic structure doctrine is also, with respect, excellently described in the 34th Sultan Azlan Shah Law Lecture on 'Judicial power and Constitutional Supremacy — Basic Features of Written Constitutions?' by The Right Honourable Dato' Seri Chan Sek Keong. I respectfully adopt the description of the basic structure doctrine in this lecture by the former Chief Justice of Singapore:

> ... The basic structure doctrine is the constitutional principle that the basic features or basic structure of a constitution cannot be destroyed or emasculated by a constitutional a mendment duly passed by Parliament in accordance with prescribed procedures ...

[167] The learned former Chief Justice went on to explain and attribute the basic structure doctrine to the Indian Supreme Court case of *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.

[168] The doctrine is well known and is best read in full text in the scholarly lecture delivered by the former Chief Justice of Singapore. Suffice to say in the context of this appeal that the introduction of the basic structure doctrine in constitutional interpretation has the effect of limiting amendment powers, but only to the extent that any amendment which breaches the doctrine is void.

[169] The doctrine was not accepted *in toto* in earlier constitutional adjudication. In *Loh Kooi Choon* Raja Azlan Shah FJ accepted that several features were essential to the FC in these now famous words:

> The Constitution is not a mere collection of pious platitudes. It is the supreme law of the land embodying three basic concepts: One of them is that the individual has

certain fundamental rights upon which not even the power of the State may encroach. The second is the distribution of sovereign power between the States and the Federation, that the 13 States shall exercise sovereign power in local maters and the nation in matters affecting the country at large. The third is that no single man or body shall exercise complete sovereign power, but that it shall be distributed among the Executive, Legislative and Judicial branches of the government, compendiously expressed in modern terms that we are a government of laws, not of men.

[170] However, the doctrine was not accepted by reason that it would affect amendments to the FC:

... It is therefore plain that the framers of our Constitution prudently realised that future context of things and experience would need a change in the Constitution and they, accordingly armed Parliament with 'power of formal amendment'. They must be taken to have intended that, while the Constitution must be as solid and permanent as we can make it, there is no permanence in it. There should be a certain amount of f lexibility so as to allow the country's growth. In any event, they must be taken to have intended that it can be adapted to changing conditions, and that the power of amendment is an essential means of adaptation. A constitution has to work not only in its environment in which it was drafted but also centuries later ...

[171] And the heart of the reasoning in rejecting the doctrine:

... This reasoning in my view, is based on the premise that the Constitution as the supreme law, unchangeable by ordinary means, is distinct from ordinary law and as such cannot be inconsistent with itself. It is the supreme law because it settles the norms of corporate behaviour and the principle of good government ... It is thus the most vital working document which we created and possess. I f it is urged that the Constitution is on the same level with ordinary law, then the Constitution is an absurd attempt on the part of the framers to limit a power, in its own nature illimitable. *In the context of cl (1) of art 160, 'law' must be taken to mean law made in exercise of ordinary legislative power and not made in exercise of the power of constitutional amendment under clause (3) of art 159, with the result that cl (1) of art 4 does not affect amendments made under cl (3) of art 159.* (Emphasis added.)

[172] The doctrine of the basic structure was also referred to in *Phang Chin Hock* and in *Mark Koding v Public Prosecutor* [1982] 2 MLJ 120. While the concept of basic or salient features of the FC were accepted in principle, a distinction was made between ordinary law and constitutional amendments effected pursuant to art 159 for the purposes of the application of art 4(1) of the FC. In other words, while 'ordinary legislation' could be struck down pursuant to art 4(1) of the FC, constitutional amendments enacted pursuant to art 159(1) were not subject to art 4(1) of the FC.

[173] In so holding in *Phang Chin Hock*, Suffian LP adopted the legal rationale put forward by Raja Azlan Shah FJ in *Loh Kooi Choon*:

> ... In our judgment, in construing art 4(1) and art 159, the rule of harmonious construction requires us to give effect to both provisions and to hold and we accordingly hold that Acts made by Parliament, complying with the conditions set out in art 159, are valid even if inconsistent with the Constitution, and that a distinction should be drawn between on the one hand Acts affecting the Constitution and on the other hand ordinary laws enacted in the ordinary way. It is federal law of the latter category that is meant by law in art 4(1); only such law must be consistent with the Constitution.

[174] In *Zaidi bin Kanapiah* the Chief Justice Tengku Maimun Tuan Mat did not accept the distinction drawn between ordinary law and constitutional amendments made pursuant to art 159 of the FC:

> [78] ... Law as appearing in art 4(1) of the FC means the same thing as 'federal law' in art 159(1) — otherwise known as 'ordinary law'. By confining the definition of 'law' in art 4(1) to 'ordinary law', a law amending the FC is not caught by the definition of 'ordinary law' and thus any amendment to the FC cannot by virtue of that interpretation be taken to conflict with art 4(1) of the FC ...
>
> [79] ... With respect, it will be noted that nowhere in the FC is the term 'ordinary law' employed or defined. Hence, such a strained reading of arts 4(1) and 159(1) of the FC is not supported by the very text of the FC ...

Analysis of whether art 4(1) of the FC is restricted to ordinary laws or extends to constitutional amendments

[175] With the greatest of respect, the legal argument of the Chief Justice Tengku Maimun Tuan Mat in relation to the reading of art 4(1) of the FC is in relation to constitutional amendments is to be preferred over the earlier constitutional stance adopted in *Loh Kooi Choon* and *Phang Hock Chin*. This is borne out, inter alia, by a coherent construction of the relevant provisions.

[176] Article 4(1) of the FC provides for the striking out of 'any law' (passed after Merdeka Day) which is inconsistent with the Constitution to the extent of the inconsistency.

[177] Article 159 of the FC provides in substance that amendments to the FC may be made by federal law.

[178] *Federal law* is defined to include any Act of Parliament.

[179] *Law* is defined to include written law, the common law so far as it is operational, custom or usage having the force of law in the Federation.

[180] *Federal law* is or falls within the scope of written law. It cannot be said

that federal law is not written law. All Acts of Parliament are federal law and written law.

[181] Given the definitions, of 'federal law' and 'law' as defined in art 160(2) of the FC, it follows that federal law must fall within written law and thereby 'law' under art 160(2) of the FC.

[182] Any constitutional amendment has to be effected by federal law, ie through an Act of Parliament. As such a constitutional amendment act is an Act of Parliament, written law and thereby 'law' for the purposes of both arts 159 and 160(2) of the FC.

[183] Article 4(1) allows for 'law' which is inconsistent with the FC to be struck out as void for inconsistency. As a constitutional amendment which is effected by federal law which takes the form of an Act of Parliament, it is written law and falls within the definition of 'law'. It follows that such 'law' is similarly subject to art 4(1).

[184] There is no legally coherent basis to draw a distinction between 'ordinary law' and a 'constitutional amendment' law within art 4(1) given the definitions of 'federal law' and 'law' in the FC.

[185] 'Federal law' is a subset of 'law'. Put another way, if concentric circles were drawn, law would comprise the larger outer circle, with 'federal law' comprising a smaller circle within the larger circle of 'law'.

[186] Therefore art 4(1) necessarily encompasses 'federal law' including any constitutional amendment effected vide an Act of Parliament.

Limits to constitutional amendment of the FC

[187] The net result of the acceptance of the basic structure doctrine as contained in art 4(1) of the FC, is that there are limits to the amendment power of Parliament. However, it is not every amendment that is forestalled, as stated earlier, but only those inconsistent with the FC. And the identity of the FC is protected by the express provisions of art 4(1) of the FC. The Constitution therefore circumscribes the boundaries beyond which an amendment would fail. Put another way, an amendment which contravenes the Constitution as a whole would not succeed.

[188] As stated by the former Chief Justice Chan Sek Keong in his 34th Sultan Azlan Shah Lecture the word 'law' in the expression 'any law' in art 4(1) of the FC is defined under art 160(2) to include 'written law' which in turn includes

A 'this Constitution'. It follows that any amendment to the Constitution is a law. Therefore, any constitutional amendment inconsistent with the FC would be void.

B **[189]** Alternatively, if art 4(1) of the FC is construed as referring to the essential features of the Constitution, those features would similarly set the boundaries or limits of permissible constitutional amendments.

C **[190]** The illustrious former Chief Justice dealt with *Phang Chin Hock* in the following manner. He stated that in that case it was stipulated that art 4(1) of the FC and art 159 of the FC ought to be given a harmonious reading, and if that is done then art 4(1) of the FC would effectively have to be 'read down' to refer solely to ordinary law and not constitutional amendments. The concern was that art 159 of the FC would be rendered nugatory.

D **[191]** However, it is argued that a full and harmonious reading may be accorded to both articles *without* rendering art 159 of the FC nugatory. *This would follow because amendments including constitutional amendments may be enacted through the process specified there, so long as they are not inconsistent with* E *the FC or at least the basic and essential features of the same.*

The legal rationale for imposing limits to constitutional amendments

F **[192]** The basis for art 4(1) of the FC is premised on the footing that a constitutional amendment that seeks to vary or alter irrevocably an essential feature or structure of the FC or which alters the manner in which power is divided under the Constitution, would amount to an inconsistency which precludes such an amendment from taking effect. And as stated earlier, the underlying rationale for that is clear. Such a constitutional amendment would G have the effect of putting into place a new constitution altogether. That is clearly contrary to the spirit, purpose and object of the FC itself.

[193] In summary therefore, in this jurisdiction there is no real necessity to invoke the basic structure doctrine as it is encompassed within art 4(1) of the H FC. The concern of the incorporation of a 'foreign' doctrine is unwarranted given art 4(1) of the FC. In point of fact, the existence of art 4(1) of the FC affords a clear, definitive and express basis for ensuring that the structure and function of the FC are not altered beyond the limits set out in the FC itself.

I **[194]** In terms of protecting the identity of the Federal Constitution, the existence of the constitutional right of judicial review in art 4(1) of the FC comprises the soul of the FC. In this jurisdiction it is effectively expressly provided for, as there is no manner in which art 4(1) of the FC can operate otherwise than by judicial review to strike down enacted statutory law which is

inconsistent with the FC. This power extends to constitutional amendments, for the reasons articulated above.

[195] In this way constitutional amendments cannot operate to change the identity of the FC itself as borne out by the express words of art 4(1) of the FC.

CONSTITUTIONALISM

[196] A consideration of constitutionalism in general bears out such a construction to be afforded to art 4(1) of the FC, and thus the Constitution as a whole. An instructive exposition is to be found in an article by Dieter Grimm on *Constituent Power and Limits of Constitutional Amendments* (Relazione al Convegno 'Costantino Mortati. Potere costituente e limiti all revisioine costituzionale' Roma 14 dicembre 2015). I refer to the portion on limits to constitutional amendments rather than constituent power:

> ... Once the constitution has entered into legal force the constituent power of the people is at the same t ime established and consumed. It cannot become relevant under the existing constitution. During the existence of the constitution only amendments are possible. *Amendments presuppose the existence of the constitution. They cannot abolish but only change it.* Even if the power to amend the constitution is given to the people they do not act in the capacity as sovereign. They act like any organ of the state. The people act as sovereign only when they abolish a constitution. They then return into the 'state of nature' where no legitimate authority exists. *Under the existing constitution even the people may only do what the constitution permits.*
>
> *This suggests that the amendment power should be regarded as an intermediate power between the constituent power and the legislative power. Other than the constituent power, it cannot enact a new constitution*. Different from the legislative power, it can change the rules for decision-making including those for legislation. All then depends on how the amendment power is regulated. Yet, there are no principles or premises which the constitution-maker has to follow when regulating the amendment process. This would be incompatible with the nature of the constituent power. It can freely determine who shall exercise the amendment power, how it is to be exercised and what may be amended, ie the holder, the process and the limits.

[197] Professor Grimm then goes on to consider the limits to amendments. He explains that since the amendment power is a constituted power there is no such thing as an amendment power without limits (Relazione al Convegno 'Costantino Mortati. Potere costituente e limiti all revisioine costituzionale' Roma 14 dicembre 2015, p 4, section 3).

[198] After considering the Weimar constitution and the consequences of the lack of an identity guarantee which allowed Hitler to rise to power without a revolution, Dieter outlines the Basic Law in Germany which contains not only

formal but also substantive limits to constitutional amendments in art 79(3). Of relevance are his statements relating to limits to constitutional amendments:

> ... Substantive limits to constitutional amendments are often seen as undemocratic. But this view becomes untenable once it is understood that the amendment power is not identical with the constituent power. The reason is exactly that the amendment power is a constituted power even if exercised by the people and therefore not completely free. The democratic principle does not stand in the way of this understanding. If the constituent power lies with the people the people are entitled to limit the amendment power. The Basic Law limited the amendment power in the interest of democracy. No constituted power should be entitled to abolish the democratic system.
>
> ... It needed the experience of fa iled democracies and of authoritarian regimes for a breakthrough of substantive limits to constitutional amendments ...

[199] Clauses in constitutions that limit substantial amendments which alter the spirit and fundamental nature of constitutions are called 'eternity clauses'. They last for the lifetime of the Constitution. In the FC, art 4(1) of the FC is the eternity clause. It ensures that the fundamental identity and the guarantees offered by the FC are not removed or abrogated. At the heart of these eternity clauses is the concept of judicial review that enables the identity of a constitution to be safeguarded. Such a constitutional power of judicial review is found in art 4(1) of the FC.

[200] Countries without an eternity clause develop the idea of inherent limits. Examples are a country like India which developed the concept of the basic structure doctrine to ensure that no substantive constitutional amendments could usurp or replace the fundamental identity of the Indian Constitution. As we have art 4(1) of the FC it is not essential that we 'adopt' the doctrine as it is already contained within the Constitution as a self-preserving safeguard for the identity of the FC.

Summary of art 4(1) of the FC

[201] The progression from this chronology of case law, judicial thinking and progression takes us back to art 4(1) of the FC. I reiterate the wide compass, scope and definitive function and purpose of this article here for ease of reference as set out in detail earlier on this judgment. In essence, this short article establishes:

(a) that the Constitution of the nation state is supreme, making this a Constitutional Supremacy;

(b) the supremacy of the Constitution is safeguarded and given 'teeth' as it were, by the existence of the power to strike out legislation which is

inconsistent with the FC. Operationally, this takes the form of constitutionally entrenched judicial review to ascertain whether or not a provision does indeed conform or not with the FC;

(c) the safeguard accorded in art 4(1) of the FC is executed by the Judiciary. As such the Judiciary is vested with powers of constitutional judicial review which include the striking down of federal law where it is inconsistent with the FC. As such the touchstone and source of judicial power cannot be confined to either art 121(1) of the FC solely nor can the Judiciary's powers be restricted to that conferred 'by or under federal law';

(d) art 4(1) of the FC by stipulating that any law that is inconsistent with the FC is void, also encompasses or contains the doctrine of basic structure expressly. This is because the FC in itself comprises the content and structure that limits constitutional amendments that are inconsistent with it; and

(e) the doctrine of separation of powers is similarly contained in this article as it provides for the Judiciary, as the guardian of the FC, to act as a check and balance against the Legislature and Executive. In this context, the FC is not self-executory and therefore cannot act to protect itself.

Judicial Power — Article 4(1) of the FC read with art 121(1) of the FC

[202] Given the breadth and scope of art 4(1) of the FC, it is untenable to describe the entirety of judicial power and the jurisdiction of the courts as being confined to the last two lines of art 121(1) of the FC, namely that '… the High Courts … shall have such jurisdiction and powers as may be conferred by or under federal law'.

[203] While it may well have been the intent of Parliament vide A704/1988 to seek to restrict or curtail judicial powers, that intent was not achieved. On an objective construction of the FC holistically it is evident that it is untenable if not impossible to read art 121(1) of the FC in vacuo when deciding on the source, scope and ambit of judicial power. The only tenable construction that can be accorded to judicial power is that it subsists in more than just art 121(1) of the FC, the foremost of which is art 4(1) of the FC.

[204] The said article appearing at the commencement of the FC, sets out the basis for the structure and function of the nation state and the division of power. As such the source of judicial power as contained in the constitutional right of review is vested there. Judicial power is also vested in art 5(2) of the FC. Article 121(1) of the FC sets out where and how such judicial power is structured, namely through the High Courts and the inferior courts. It also sets

A out the fact that jurisdiction of the courts and its powers are enumerated and set out in federal law.

[205] But these constitutional provisions do not and cannot abrogate judicial power in terms of the inherent jurisdic tion of the court or the constitutional power of judicial review which is contained in art 4(1) of the FC. This is borne out by a simple example. If indeed judicial power is confined to, and limited by, federal law as a literal reading of art 121(1) of the FC may suggest, then how is that there subsists at the same time, power in the Judiciary or the courts to strike down that very same federal law if it is inconsistent with the provisions of the FC? It is contrary to any form of coherent legal rationale that it can be said on the one hand that judicial power is circumscribed by federal law, but on the other, hand, that self-same judicial power can strike down that very same federal law within the same Constitution.

[206] As a constitution is to be read harmoniously, it follows that the only tenable reading to be accorded to an understanding of the source and scope of judicial power is that *judicial power takes its source and ambit from art 4(1) of the FC read in conjunction with art 121(1) of the FC*.

The effect of s 15B of the POCA

[207] Turning back to s 15B of the POCA, the question of the constitutional validity of that section becomes clear. It should be noted that it is not a constitutional amendment but an amendment to existing legislation to seek to oust the jurisdiction and power of the courts, save for a narrow window relating to procedural irregularities within the Act itself.

[208] If such a provision is applied in its literal form, it means that no court can undertake the function of ascertaining whether or not s 15B of the POCA conforms with the FC, because judicial review in any form is prohibited. It goes further to seek to excise the jurisdiction of the courts to do so. This necessarily includes an attempt to excise the constitutional entitlement of the courts to undertake their review function under art 4(1) of the FC. Can a statutory provision override and supersede the constitutional power of judicial review contained in art 4(1) of the FC?

(The allowance for review in relation to procedural irregularities still abrogates the full purpose and objective of art 4(1) of the FC.)

[209] Going further, can such a provision operate to preclude the courts from ascertaining the constitutional validity of the very clause which seeks to immunise all decisions made under POCA? From the extensive analysis of both the law and case law, past and present, the answer is a resounding no. It is in

substance inconsistent with the provisions of art 4(1) of the FC itself. Accordingly, it is void.

[210] It has been argued in *Maria Chin* that legislation cannot be inconsistent with art 4(1) of the FC itself, but that in order to be found to be void, must be inconsistent with some other provision of the FC itself.

[211] If that argument is taken to its logical end it would mean that if a similar ouster clause is placed in any piece of legislation, then the entire statute cannot be judicial ly scrutinised to even check whether that provision is inconsistent with any other constitutional provision. This is because the ouster clause precludes the court from even scrutinising the substantive provisions of that particular statute to check whether it conforms to the FC. And that is because any form of judicial review is prohibited, save for procedural irregularities. So how is the court to ascertain whether or not a statutory provision or statute conforms with the FC, unless it can undertake its judicial review role in art 4(1) of the FC? As the ouster clause directly contradicts art 4(1) of the FC by preventing judicial review, it follows that it is inconsistent with that article and no other. It is only after undertaking a review under art 4(1) of the FC that it can be ascertained whether in fact, the particular statute or statutory provision is consistent with the FC, or not. To determine otherwise would be to render art 4(1) of the FC nugatory.

[212] As such, s 15B of the POCA being inconsistent with art 4(1) of the FC, is void and of no effect. It cannot operate to immunise all decisions made under POCA by use of the ouster clause save for procedural irregularities.

THE CONSEQUENCE

[213] As a consequence of s 15B of the POCA being void, it follows that the court's powers of judicial review are no longer restricted to reviewing merely irregularities of procedure within POCA itself. The court is entitled to scrutinise more substantive matters, including for instance whether the basis for the detention is in accordance with the relevant preventive detention legislation as well as arts 149 and 151 of the FC. Put another way, the court may review the legality of the decision. However, the invalidity of s 15B of the POCA does not allow the court to review the merits of the Minister's decision and substitute its own decision for that of the Minister. That is not, and was never the purpose of the review function of the court. Such is evident from the case law subsisting pre-amendment, which clearly sets out the still limited function of the court in reviewing preventive detention matters. The courts are not equipped to deal with matters of policy and do not interfere in the same, as such matters fall within the purview of the other branches of government, particularly the Executive.

A POSTSCRIPT

[214] At the time of the writing of this judgment, a nine-member panel of the Federal Court handed down a unanimous decision in the case of *SIS Forum (M) v Kerajaan Negeri Selangor (Majlis Agama Islam Selangor, intervener)* [2022] 2 MLJ 356; [2022] 1 LNS 218 ('SIS Forum'). There the court affirmed the significance of art 4(1) of the FC and how it espouses the concept of constitutional judicial review, separation of powers and further, how the civil superior Judiciary is the sole body through which such judicial power is exercised. The views expressed in this judgment fully accord with the views expressed in *SIS Forum* and accordingly should be read together.

OTHER ISSUES DEALT WITH IN THE JUDGMENT

Non-compliance with s 4(2) of the POCA

[215] The complaint centres on the premise submitted on behalf of Dhinesh that the magistrate did not consider the statement by the public prosecutor in extending Dhinesh's remand for the second period of 38 days. In this context, s 4(2) of the POCA stipulates:

> 4 Procedure before Magistrate
>
> ...
>
> (2) Any person remanded under paragraph 1(a) shall, unless sooner released, on or before the expiry of the period for which he is remanded be taken before a Magistrate who shall —
>
> (a) On production of:
>
> (i) A statement in writing signed by the Public Prosecutor stating that in his opinion sufficient evidence exists to justify the holding of an inquiry under Section 9; and
>
> (ii) A statement in writing signed by a police officer not below the rank of Assistant Superintendent stating that it is intended to hold an inquiry into the case of that person under Section 9, order the person to be remanded in custody for a period of thirty-eight days; or
>
> If no such statement is produced, and there are no other grounds on which the person is lawfully detained, direct his release.

[216] It is evident that the magistrate may order the remand of a detenu for a further period of 38 days on production of:

(a) a written statement by the public prosecutor; and

(b) a written statement by a police-officer not below the rank of Assistant Superintendent. A

[217] It was submitted for Dhinesh that on the face of the remand order, the magistrate granted the 38 day remand order based on a written statement prepared by the police officer under s 4(2)(a)(i) of the POCA. The exhibit disclosed that the police officer holding the rank of an Assistant Superintendent of Police had erroneously stipulated that the document was prepared under s 4(2)(a)(ii) of the POCA rather than s 4(2)(a)(i) of the POCA. B

C

[218] The respondent sought to rely on a written statement prepared by the deputy public prosecutor, which it was alleged by the respondent was indeed made available to the magistrate prior to the 38-day remand being ordered. however, there is no affidavit positively affirming to the fact by the public prosecutor. There is instead a statement by the inquiry officer stating that there was compliance with both sub-sections of s 4(2)(a) of the POCA. D

[219] The High Court judge who heard the application for habeas corpus at first instance dismissed this issue of non-compliance outright.

E

[220] We considered the entirety of the evidence and were not satisfied that there was compliance with s 4(2)(a) of the POCA in its entirety. This is evident from a consideration of the order of remand issued by the magistrate, as:

(a) there is a reference to s 4(2)(a)(i) of the POCA only. That section refers to the requirement for a statement from a public prosecutor to the effect that sufficient evidence subsists for an inquiry under POCA to be held. However, there is no such statement referred to in the remand order. Instead, the magistrate makes reference to a statement by the ASP, one Mohammad Fairus bin Baharom. Therefore, the requirement for a statement from a public prosecutor is not met. That amounts to an irregularity in that s 4(2)(a)(i) of the POCA has not been met; F G

(b) the reference to the statement by ASP Mohammad Fairus bin Baharom actually relates to s 4(2)(a)(ii) of the POCA. While s 4(2)(a)(ii) of the POCA is complied with, the remand order makes reference to the wrong subsection; and H

(c) the respondent's reference to the requisite statement by a public prosecutor as annexed as an exhibit has not been shown to have been contemporaneously available at the time the remand order for a further 38 days under s 4(2)(a) of the POCA was made. This is further corroborated by Dhinesh's allegations in his affidavit. I

[221] In all these circumstances, we were satisfied that there was

non-compliance with s 4(2) of the Prevention of Crime Act 1959 ('the POCA').

The academic issue

[222] This issue, which was raised by the respondent, relates to the contention that the failure to comply with s 4(2) of the POCA was academic at the time of the hearing of this appeal, as by that date, the remand order had expired and replaced with a detention order comprising a duration of two years under s 19A(1) of the POCA.

[223] This contention was put forward in line with the decisions in *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri Malaysia & Ors* [2006] 1 MLJ 309; [2005] 4 CLJ 613 ('Faizal Haris') as well as *L Rajanderan a/l R Letchumanan v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2018] supp MLJ 393; [2010] 7 CLJ 653 ('Rajanderan') and *Goh Leong Yong v ASP Khairul Fairoz bin Rodzuan & Ors* [2021] 5 MLJ 474; [2021] 8 CLJ 331 ('Goh'). The legal rationale in that line of cases was that:

> [9] ... a writ of habeas corpus must be directed only against the current detention order even if the earlier arrest of the detainee is irregular ...
>
> Any questions on the legality or propriety of the arrest or detention of a detainee at the investigation stage is not a relevant consideration nor is it a pre-condition to the order of detention of the Minister ...
>
> See *Rajendran*.

[224] This issue of whether a prior irregularity would invalidate a subsequent order of detention by the Minister under s 19A(1) of the POCA was considered by the majority in *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases* [2021] 3 MLJ 759 ('Zaidi bin Kanapiah') as well as (see *Lei Meng v Inspektor Wayandiana bin Abdullah & Ors and other appeals* [2022] 3 MLJ 203 decided on 7 January 2022) ('Lei Meng'). The majority decision in *Zaidi bin Kanapiah* and the unanimous decision in *Lei Meng* was that such a prior defect was not academic and remained available to be considered by the courts even after expiry of such a remand order.

[225] As this subject has been extensively analysed in both cases, it is not necessary to repeat the arguments extenso here. Sufficient to state that the remedy of the writ of habeas corpus in this jurisdiction is available by reason of art 5(2) of the FC. The availability of the application of art 5(2) of the FC, even in preventive detention legislation to question the legality of a detention has been explained at the outset. Once art 5(2) of the FC comes into play, it is incumbent upon a High Court judge to inquire into the legality of the detention. This is expressly provided for in the FC. And the relevant date for

the consideration of the High Court or High Court judge is the date of the filing of the application for judicial review of the legality of the detention. This in turn is because art 5(2) of the FC would be rendered nugatory if it could simply be said that a particular period of detention under a specific section of POCA had expired and been replaced by detention under a different section, thereby immunising such an executive decision from judicial scrutiny as required under art 5(2) of the FC.

[226] It was further explained in *Zaidi bin Kanapiah* and echoed in *Lei Ming* that the various stages of detention under various sections of POCA, or even if detention was effected under separate legislation continuing on from a POCA detention, would be treated as one over-arching transaction. This ensures that the right of review of a detention to ensure that it is legal is not abrogated.

[227] It was also stipulated that on appeal, the issue of any particular relevant period of detention, even if expired, cannot be academic because it is incumbent upon this appellate court to determine whether or not the decision of the High Court was correct or otherwise. Otherwise, the appellate right accorded to the detenu (in this case) would be ineffective and futile (*Mohamad Ezam bin Mohd Noor v Ketua Polis Negara & Other Appeals* [2002] 4 MLJ 449 ('Ezam')).

[228] For these reasons we rejected the contention that the issue of the irregularity in the expired remand period under s 4(2)(a) was academic.

Failure by the board to call witnesses requested for by the detenu, Dhinesh

[229] The issue raised on behalf of Dhinesh in this respect was the refusal by the Board, more particularly the Chairman of the Board, to call or facilitate the calling of a particular witness requested for by Dhinesh at the hearing of the inquiry before the Board. The facts as affirmed to by Dhinesh and not specifically refuted by the respondent's witnesses are that:

(a) Dhinesh required Mathan Raj to be present at his inquiry on 14 January 2020;

(b) Dhinesh sought to call Mathan Raj as a witness at his inquiry to establish the fact that he was not involved in the criminal activities which had been ascribed to him;

(c) Mathan Raj was, at the time, detained at the same facility as Dhinesh;

(d) Mathan Raj waited outside the room where the inquiry was held, on 14 January 2020, prepared to testify as the second witness in favour of Dhinesh;

(e) Dhinesh's mother was the first witness and was allowed to testify;

(f) Mathan Raj was not called to testify at the witness despite his presence outside the inquiry room;

(g) Mathan Raj affirmed an affidavit to this effect, further stating that he enquired of Dhinesh why he hadn't been called; and

(h) the Chairman of the Board affirmed to the fact that Dhinesh had not expressed an intention nor requested to call Mathan Raj.

[230] Two issues arise as a consequence of these events:

(a) how the detainee's right to call witnesses ought to dealt with in light of art 151 of the FC, the provisions of POCA and regulations made under POCA; and

(b) the issue of serious conflict arising between accounts relating to such fundamental issues.

Issue (a): The right to call witnesses by the detainee

[231] Article 151 of the FC sets out the fundamental rights accorded to a detainee who is preventively detained under preventive detention legislation, including POCA. The requirement for a hearing before an advisory board is an essential condition of preventive detention under art 151(1)(b):

> ... (b) no citizen shall continue to be detained under that law or ordinance unless an *advisory board constituted as mentioned in Clause (2) has considered any representations made by him under paragraph (a)* and made recommendations thereon to the Yang di-Pertuan Agong wihtin three months of receiving such representations, or within such longer period as the Yang di Pertuan Agong may allow ... (Emphasis added.)

[232] It is essential therefore for the Board to consider any representations made by the detainee. There is a reference to limb (a) in relation to such representations by the detainee. Limb (a) provides:

> (a) the authority on whose order any person is detained under that law or ordinance shall, as soon as may be, inform him of the grounds for his detention, and subject to Clause (3), the allegations of fact on which the order is based, *and shall give him the opportunity of making representations against the order as soon as may be* ... (Emphasis added.)

[233] Limb (a) encapsulates the twin pillars of natural justice, namely that a person is to be accorded the right to be heard firstly, by his being advised of the reasons for his detention, and secondly, the opportunity to put forward his defence to those allegations in the form of representations before the Board.

[234] In order to give effect to art 151(1) of the FC therefore, the detainee ought to be given full access and opportunity to comprehend the charges against him and to put forward his defence in the best manner he sees fit. This is because his liberty is at stake for some considerable period of time. More importantly he stands to lose his liberty without the benefit of a full and open trial, due to the nature of the allegations underlying his detention. As such, full effect should be accorded to enable the detainee to make an effective representation.

[235] In so far as the Board is concerned, it takes on the role of the adjudicator or a judge in the context of preventive detention. The role of the Board in hearing representations takes on particular significance because, as stated earlier, the detainee is deprived of the benefits of a full trial, which are available in the case of a normal criminal offender. When viewed in this light it is clear that the hearing before the Board comprises the single most opportunity afforded to the detainee to present his case with a view to presenting his version of events to contradict the statement of facts and allegations made against him.

[236] It is therefore imperative that the Board adopts an independent and unbiased approach to all matters before it, given the importance of the task it undertakes, namely to endorse and deprive a citizen of his l iberty pursuant to special legislation enacted pursuant to art 149 of the FC.

[237] Article 151(2) of the FC requires, inter alia, ensuring:

(a) a complete lack of bias in favour of, or against, either party, ie impartiality;

(b) an equality of arms;

(c) no conflict of interest subsists; and

(d) these are but some of the basic matters in respect of which the detainee is accorded full protection. The categories are not closed and should be assessed on the basis of the particular factual matrix of a case.

[238] The foregoing also explains why in art 151(2) of the FC, the persons appointed to the position, of Chairman, comprise a person who was, or is qualified to be a judge of the Federal Court, the Court of Appeal or a High Court. The Chairman is required to be entirely conversant and familiar with the requirements of natural justice, as would be a judge of the superior courts. In this context, according a person a full opportunity to be heard in a real sense, would be second nature to such an appointee.

[239] Given the foregoing, when complaints of a breach of natural justice, or the detainee not being afforded a full opportunity to be heard are mode, such

A complaints should be measured and heard against the fundamental requirements set out in art 151 of the FC.

[240] Regulation 8A of the Advisory Board Procedure provides:

B 8A Advisory Board may summon witnesses

For the purposes of these Regulations, the Advisory Board may summon and examine any witnesses, administer the oath or affirmations and compel the production of any documents.

C **[241]** Bearing in mind the purport and intent of art 151 of the FC, it follows that these regulations are to be read and considered in that context. The Regulations facilitate the inquiry before the Board in that they allow the Board to arrive at its decision on a better evidential basis by summoning witnesses and calling for the production of documents where necessary. Clearly any such D summoning of witnesses or call for documents is equally weighted in favour of the detenu and the respondent.

[242] The use of the word 'may' denotes a discretion on the part of the Board. E It clearly means the Board may choose to allow a party to call a witness or reject the request. It is equally clear however, that any such exercise of discretion must be unbiased, impartial and take into account the needs of the detainee to make a full representation. In short it cannot be exercised arbitrarily.

F **[243]** It should be emphasised that it is not every request for the summoning of a witness that must be met. It falls well within the purview of the Board to reject a request where the request, in the objective opinion of the Board, serves no useful purpose, would unnecessarily delay matters and would not prejudice the 'defence' or representation the detainee seeks to put forward. Equally, it is G clear that a request must be made as a matter of fact and the reasons for the calling of the witness be made clear.

[244] In summary the right of a detainee to summon witnesses subsists and H ought to be given effect where it is necessary in order that the detainee is accorded an opportunity to present a full representation as to why he should be released. This accords with the principles of natural justice as encapsulated in art 151 of the FC. That right is not an absolute right but one which is determined by the Board, exercising its powers rationally, judicially and not I arbitrarily.

(b) The issue of serious conflict arising between accounts relating to such fundamental issues

[245] In the instant appeal, as is evident from the recitation of the salient facts, there was a serious conflict between the evidence of the detainee and his supporting witness Mathan Raj versus the evidence put forward by the Board through its secretary as well as the Chairman. It is also the case that it is difficult for the court in a situation such as this to make a determination as to the veracity of each version in the absence of any other documentary evidence.

[246] There is a tendency to presume that there is no reason for the Board to affirm to anything other than the truth of what occurred, as it is expected to be unbiased. However as famously stated in *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256; [1923] All ER Rep 233 — 'Justice must not only be done but must be seen to be done'.

[247] Given the purport of art 151 of the FC it is imperative that the detenu's version of events not be rejected outright and the Board's version assumed to be correct. To ensure that impartiality is ensured, the diametrically opposed versions ought to be tested.

[248] Even without applying *SK Tangakaliswaran a/l Krishnan v Menteri Dalam Negeri, Malaysia & Ors* [2010] 1 MLJ 149; [2009] 6 CLJ 705, it follows that an adjudicatory authority is able to undertake its task of adjudication with evidence, particularly where such evidence is readily available.

[249] Where such evidence is forthcoming and it is not tenable to arrive at a conclusive decision otherwise, the benefit of the doubt ought to be given to the detainee, as the burden lies throughout on the authorities to prove that all requisite procedures and relevant provisions of the FC have been complied with.

[250] The divergence of versions could have been resolved in the instant case by the respondent producing the minutes of the inquiry, which would have provided a contemporaneous note of what transpired. That would have resolved the conflicting accounts of the parties. The relevant confidential matters relating to security could have been redacted or held in camera.

[251] Authority for this proposition is to be found in the decision of this court in *Mohammad Azanul Haqimi bin Tuan Ahmad Azahari v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2019] 6 MLJ 220; [2019] 8 CLJ 465 ('Haqimi'). It is authority for the proposition that the failure to adduce minutes of the inquiry, where the burden to justify the detention in question lies on the respondents, amounts to a wilful withholding of material evidence. This enables an inference favourable to the detainee to be made and also an adverse inference against the respondents. In short, the presumption was made that if the respondents had adduced the contents of the minutes of the Board hearing,

A the contents of those minutes would have been unfavourable to them.

[252] Similarly, in the instant case we are constrained to invoke the ratio in *Haqimi* and to draw an adverse inference against the respondents for failing to provide the relevant minutes of the inquiry. This would have shown instantly what actually happened, ie whether the detainee asked for Mathan Raj to be called or did not. As stated in *Haqimi*, security concerns relating to national interests, if any, could have been dealt with by redaction. At the very least, the relevant minutes could have been produced for perusal by the court. None of this however was done.

[253] In these circumstances we were left with no alternative but to conclude, given the adverse inference drawn, that there was a failure to permit Mathan Raj to give evidence as requested for by the detainee. The consequence is that the failure to accord the detainee a full opportunity to put forward his representations against his preventive detention for a lengthy period, were denied. This amounts to a breach of natural justice as contained in art 151 of the FC. It is a substantive irregularity. Therefore, this issue which had merit, comprised another ground for the issuance of an order of habeas corpus.

Delay

[254] The issue of delay related to alleged delay by the investigating officer in preparing and submitting the full investigation report pertaining to Dhinesh under s 4A of the POCA. The complaint related to a delay of 21 days.

[255] There was a further complaint of delay of 23 days in the submission of the inquiry report by the inquiry officer to the Board. These issues will be considered together.

[256] At the heart of this issue of delay at the material time was the seeming conflict between the cases of *Chua Kian Voon* and the case of *Tamilarasan a/l Subramaniam v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2021] 6 MLJ 147.

In *Chua Kian Voon* this court held in the context of the lack of stipulation of specific time periods in the Regulations to POCA, that where no time period is prescribed, s 54(2) of the Interpretation Acts 1948 and 1967 should be relied upon. The said subsection provides:

> 54 Computation of time
>
> (2) Where no t ime is prescribed within which anything shall be done, that thing shall be done with all convenient speed and as often as the prescribed occasion arises.

[257] And what amounts to 'all convenient speed' depends upon the facts and peculiar circumstances of each case (see *Kumaresan a/l Batumalai v Menteri Dalam Negeri, Malaysia & Ors* [2019] MLJU 1517; see also *Kumaran Suppiah v Dato' Noh bin Haji Omar & Anor* [2006] 6 MLJ 393 on this point relating to delay only. It held that any delay in a matter that must be done within a reasonable time must be satisfactorily explained).

[258] In short, the ratio of *Chua Kian Voon* is that as the regulations provide no specific time period within which specific reports like the investigation and inquiry reports have to be completed, it follows that they should be undertaken expeditiously.

[259] However, in *Tamilarasan*, this court decided that the issue of delay does not arise as long as the relevant reports are submitted within the entirety of the 60-day period as specified under POCA as the maximum time allowed for detention prior to the issuance of a detention order. It was suggested that the decision of this court in *Chua Kian Voon* was per incuriam. And that conclusion was reached on the basis that the court in *Chua Kian Voon* was not aware or that it was not brought to their attention that the total span of time within which detenti on could continue was a total of 60 days. Accordingly, as long as reports were all submitted within the entirety of the 60 day period, there could be no issue of 'delay' or procedural irregularity. In short, *Tamilarasan* immunises delay on the part of the respondent, whether through its investigating or inquiry officers, allowing them to undertake these statutory duties at such time as is suitable, so long as it does not go beyond the entirety of the statutory period of 60 days.

[260] Such a construction, with respect, does not give any cognisance to the importance of the liberty of a citizen who has been preventively detained without the full procedures having been complied with, and in the absence of a detention order. Pending the issuance of a detention order under POCA, the citizen is arrested and remanded pending ascertainment of whether he should be detained or not. It therefore becomes clear that the issuance of the relevant reports, which form the primary basis for the issuance of the detention order, are of prime importance. Equally important and significant is the time taken to produce such reports. As liberty is a precious feature of life, delay taken in producing these reports will necessarily impinge on, and prejudice the detenu in terms of the pe riod he spends in detention prior to the inquiry.

[261] It is for this reason that *Chua Kian Voon* and a series of cases preceding *Chua Kian Voon* have recognised that in the absence of specific time limits in preventive detention like POCA, the process of determining detention should be undertaken at all convenient speed. And not to simply allow the full period of sixty days to lapse when this period could have been lessened considerably.

[262] In any event this matter has been full considered and dealt with in *Timbalan Menteri Dalam Negeri, Malaysia & Anor v Awang Sari bin Lasikan* (05(HC)-69–04 of 2021(B)) (unreported) (decided on 7 December 2021), a case which asserted the correctness of *Chua Kian Voon* in preference over *Tamilarasan*. As such, *Chua Kian Voon* now represents the correct position in law and is consequently binding.

[263] When we considered the entirety of the events and reasons given by the investigating officer and the inquiry officer, we were not convinced that there was undue delay amounting to a fatal irregularity that prejudiced Dhinesh. Therefore, we held that while we were unable to agree with *Tamilarasan* and preferred the reasoning in *Chua Kian Voon v Menteri Dalam Negeri Malaysia & Ors* [2020] 1 MLJ 351; [2020] 1 CLJ 747 (FC), we were satisfied that there was a proper explanation given for the time taken to submit the relevant reports on the facts of the instant appeal.

[264] My brother Justice Harmindar Singh Dhaliwal has read this judgment in draft and expressed his agreement with the same.

[265] My sister Justice Rhodzariah Bujang has read this judgment in draft. With respect to the issue relating to ouster clauses, my sister retains the position taken in the case of *Shudangshu Chandra v Ketua Pengarah Imigresen Malaysia & Ors* [2022] 3 MLJ 277 where in para 17 it was held that the issue of the constitutionality of an ouster clause was the subject of a pending appeal in this court when an application to review the decision of a five member panel in *Nivesh Nair a/l Mohan v Dato' Abdul Razak bin Musa, Pengerusi Lembaga Pencegahan Jenayah & Ors* [2021] 5 MLJ 320; [2021] 8 CLJ 163 ('Nivesh') was allowed. As the matter is currently re-fixed for hearing on 25 April 2022 Justice Rhodzariah is of the view that this issue would be better and more expeditiously dealt with at the rehearing of *Nivesh*. Apart from this my sister is in agreement with the judgment.

[266] For all these reasons we unanimously ordered that a writ of habeas corpus should issue.

Writ of habeas corpus granted.

Reported by Ashok Kumar